(4)

Supreme Court, U.S.
FILED

No. 98 836 NOV 18 1998

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1998

IMMIGRATION AND NATURALIZATION SERVICE AND ROSANNE SONCHIK, DISTRICT DIRECTOR, PETITIONERS

v.

DANIEL MAGANA-PIZANO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General
Counsel of Record

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Assistant Attorney General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

DONALD E. KEENER
ALISON R. DRUCKER
HUGH G. MULLANE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202)514-2217

11 pp

TABLE OF CONTENTS

	Page
Appendix A (court of appeals' amended opinion, Nov. 13, 1998)	1a
Appendix B (court of appeals' opinion, Sept. 1, 1998)	25a
Appendix C (judgment of district court, Apr. 8, 1997)	48a
Appendix D (district court docket entry, Apr. 7, 1997)	49a
Appendix E (decision and order of immigration judge, Oct. 4, 1996)	50a
Appendix F (decision of Board of Immigration Appeals, Mar. 14, 1997)	53a
Appendix G (constitutional and statutory provisions involved)	55a
Appendix H (decision of Board of Immigration Appeals in *In re Soriano*, June 27, 1996)	65a
Appendix I (order of Attorney General vacating decision of Board of Immigration Appeals in *In re Soriano*, Sept. 12, 1996)	98a
Appendix J (decision of the Attorney General in *In re Soriano*, Feb. 21, 1997)	99a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 97-15678, 97-70384
INS No. A35-822-607
D.C. No. CV 97-00619 SMM

DANIEL MAGANA-PIZANO, PETITIONER-APPELLANT

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLEE

Argued and Submitted Aug. 12, 1997

Filed Sept. 1, 1998
Amended Nov. 13, 1998

Appeal from the United States District Court for the District of Arizona;

Stephen M. McNamee, District Judge, Presiding and

A Petition for Review of An Order of the Board of Immigration Appeals

Before: GOODWIN and THOMAS, Circuit Judges, PREGERSON,* District Judge.

---

* The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

ORDER

It is ordered that the opinion filed on September 1, 1998, be amended to delete the paragraph at page 5, as reported in 152 F.3d 1213 at 1215, which states:

> Petitions for review filed between the passage of IIRIRA on September 30, 1996, and IIRIRA's general effective date of April 1, 1997, are governed by iterim transitional rules. See IIRIRA § 309(c); *Kalaw* v. *INS*, 133 P.3d 1147, 1150 (9th Cir. 1997).

In lieu thereof, the following language is hereby substituted:

> Immigration proceedings initiated by the INS before IIRIRA's general effective date of April 1, 1997, in which a final deportation or exclusion order was filed after October 30, 1996, are governed by interim transitional rules. *See* IIRIRA § 309(c); *Kalaw* v. *INS*, 133 F.3d 1147, 1150 (9th Cir. 1997).

OPINION

PER CURIAM:

With enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Congress dramatically altered our immigration laws and judicial remedies for immigrants facing deportation or exclusion. To consider the proper jurisdiction for habeas corpus petitions and petitions for review of Board of Immigration Appeals decisions under the new statutes, we consolidated these actions. We dismiss the petition for review for lack of

jurisdiction, but hold that the petitioner may pursue habeas corpus relief under 28 U.S.C. § 2241 in the United States District Court.

I

Daniel Magana-Pizano is a 25-year old native and citizen of Mexico who entered the United States on December 28, 1977, as the five-year old child of a lawful permanent resident. Magana-Pizano's parents and three of his siblings are lawful permanent residents of the United States; his fourth sibling is a United States citizen. Since his admission into the United States, Magana-Pizano has resided in Southern California and Arizona. He attended high school in the United States, and most recently worked as a fork lift operator.

His past includes a criminal history, albeit for mostly minor offenses. Relevant to this appeal, he was convicted in February 1995 in a California state court of being under the influence of cocaine and methamphetamine in violation of section 11550(a) of the California Health and Safety Code, a misdemeanor offense.

On May 17, 1996, the Immigration and Naturalization Service ("INS") issued an Order to Show Cause[1] to Magana-Pizano alleging that he was deportable as a

[1] The Order to Show Cause alleged that Magana-Pizano was deportable under INA § 241(a)(2)(B)(i), codified at 8 U.S.C. § 1251 (1994) (redesignated by IIRIRA § 305(a)(2) as INA § 237(a)(2)(i), to be codified at 8 U.S.C. § 1227(a)(2)(B)(i) (Supp. II 1996)). This section provides that "[a]ny alien who at any time after entry has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is deportable."

result of this misdemeanor criminal conviction. At his deportation hearing, Magana-Pizano conceded his deportability as a result of the drug conviction, but indicated that he would apply for a discretionary waiver of deportation under Section 212(c) of the Immigration and Nationality Act ("INA").

Unbeknownst to Magana-Pizano, Congress had already passed AEDPA, Pub.L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 15, 18, 22, 28, 40, 42, 50 U.S.C.). Section 440(d) of AEDPA amended INA § 212(c) to eliminate discretionary relief for aliens convicted of most drug-related crimes, including Magana-Pizano's.[2] As a result of this statutory change, the INS filed a motion to pretermit Magana-Pizano's application for relief under INA

---

[2] Section 440(d) of AEDPA modifies 8 U.S.C. § 1182(c) to provide that the Attorney General no longer has the authority to waive deportation of aliens convicted of certain crimes, such as those involving controlled substances. It provides:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(c)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion in him under section 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 1251(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1251(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 1251(a)(2)(A)(i) of this title.

§ 212(c), arguing that section 440(d) of AEDPA and its amendment to section 212(c) were effective as of the date of passage on April 24, 1996. These changes provided that any alien who, like Magana-Pizano, was deportable due to a criminal conviction under 8 U.S.C. § 1251(a)(2)(B), was statutorily ineligible for discretionary relief.

The Immigration Judge granted the INS motion to pretermit Magana-Pizano's application and ordered Magana-Pizano deported to Mexico. Magana-Pizano appealed this decision to the Board of Immigration Appeals ("BIA"), which sustained the deportation order based on AEDPA changes to INA § 212(c), and the Attorney General's opinion in *Matter of Soriano*, Int. Dec. 3289 (A.G. Feb. 21, 1997). Magana-Pizano filed a timely petition for review of the BIA's decision with this Court.

Magana-Pizano also filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the United States District Court for the District of Arizona. In his habeas petition, he argued that the BIA's decision and interpretation of AEDPA section 440(d) violated the Equal Protection Clause of the Constitution. The district court dismissed the complaint without prejudice for lack of jurisdiction, explaining that the statutory basis for habeas review for aliens in custody pursuant to an order of deportation was repealed by a different section of AEDPA. *See* AEDPA § 401(e), repealing 8 U.S.C. § 1105a(a)(10). Magana-Pizano filed a timely appeal of that decision to this Court. We sua sponte consolidated both matters.

II

We first address Magana-Pizano's petition for review of the BIA decision holding that he was ineligible for discretionary relief under INA § 212(c). Magana-Pizano challenges the BIA's interpretation of AEDPA section 440(d) and its applicability to his case. We cannot reach the merits, however, because of new limitations that Congress has placed on our ability to hear such claims.

Prior to passage of IIRIRA, Pub.L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), as amended by Act of Oct. 11, 1996, Pub.L. No. 104-302, 110 Stat. 3656, the United States Court of Appeals was the proper tribunal for parties who wished judicial review of a BIA decision. *See* INA § 106(a), 8 U.S.C. § 1105a (1994) (repealed 1996). That now-repealed INA section provided that an alien could obtain judicial review by the appropriate court of appeals after entry of a final order of deportation.

Immigration proceedings initiated by the INS before IIRIRA's general effective date of April 1, 1997, in which a final deportation or exclusion order was filed after October 30, 1996, are governed by interim transitional rules. *See* IIRIRA § 309(c); *Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997).[3] Because the BIA's decision holding Magana-Pizano statutorily ineligible for relief was issued March 17, 1997, IIRIRA's transi-

---

[3] The scope and validity of the permanent changes made by IIRIRA are not before us and we therefore decline to address those issues.

tional provisions apply to his case. *See* IIRIRA § 309(c)(4); *Kalaw*, 133 F.3d at 1150.[4]

Section 309(c)(4)(G) provides:

> there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

The INS concedes that this Court nonetheless retains a limited scope of judicial review for aliens who are deportable for criminal offenses enumerated in section 309(c)(4)(G) of IIRIRA—"[to] determine for itself whether the petitioner is (i) an alien (ii) deportable (iii) by reason of a criminal offense listed in the statute."

---

[4] IIRIRA's jurisdictional changes are still subject to the judicial presumption against retroactive application of new legislation to pending cases. *See Hughes Aircraft Co. v. U.S. ex rel Schumer*, 520 U.S. 939, 117 S. Ct. 1871, 1878, 138 L.Ed.2d 135 (1997) ("[t]he fact that courts often apply newly enacted jurisdiction-allocating statutes to pending cases merely evidences certain limited circumstances failing to meet the conditions for our generally applicable presumption against retroactivity, not an exception to the rule itself."); *LaFontant v. INS*, 135 F.3d 158, 163 (D.C. Cir.1998) ("the Supreme Court has clearly established the principle that in determining retroactivity, jurisdictional statutes are to [be] evaluated in the same manner as any other statute.")

Yang v. INS, 109 F.3d 1185, 1192 (7th Cir. 1997), *cert. denied*, — U.S. ——, 118 S. Ct. 624, 139 L.Ed.2d 605 (1997). Magana-Pizano does not dispute that he is an alien deportable by reason of having committed one of the enumerated crimes. Rather, he argues that the Immigration Judge's and BIA's reading of AEDPA § 440(d) constitute an impermissible retroactive application of the amended statute.

Congress evidenced a specific intent for IIRIRA to apply retroactively to pending cases simply by virtue of its creation of transitional rules. *See* IIRIRA § 309(c). To this end, we note that this Court had jurisdiction to review certain final orders of deportation "only because Congress had conferred it." *Duldulao v. INS*, 90 F.3d 396, 399-400 (9th Cir. 1996); *see also Carlson v. Landon*, 342 U.S. 524, 537, 72 S. Ct. 525, 96 L.Ed. 547 (1952) ("The power to expel aliens, being essentially a power of the political branches of government, the legislative and the executive, may be exercised entirely through executive officers, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.") (internal quotation marks and footnote omitted)). Because Magana-Pizano's arguments are not within the narrow scope of this Court's review on direct appeal under IIRIRA's transitional rules, we dismiss his petition for review for lack of jurisdiction.

III

A

The district court denied Magana-Pizano's habeas corpus petition after concluding that the statutory basis

for habeas review for aliens in custody pursuant to an order of deportation had been repealed by AEDPA. We agree that one avenue has been eliminated, but hold that the district court retains jurisdiction under 28 U.S.C. § 2241 when the petitioner has no other judicial remedy. Thus, we reverse the judgment of the district court.

Prior to the passage of AEDPA and IIRIRA, aliens wishing to challenge the constitutionality of a final order of deportation via habeas corpus did so using one of two general methods: (1) proceeding pursuant to INA § 106(a)(10); or (2) proceeding pursuant to the general statutory habeas provision of 28 U.S.C. § 2241.[5] Prior to its repeal by AEDPA, INA § 106(a) provided the primary means of habeas review because its scope was broader than 28 U.S.C. § 2241.[6] Magana-Pizano filed his habeas petition pursuant to 28 U.S.C. § 2241.

We had previously expressly declined to decide the scope of habeas remaining after passage of AEDPA. *See Duldulao*, 90 F.3d at 400 n. 4. However, we recently decided that the remedy of habeas corpus was

---

[5] 28 U.S.C. § 2241 provides that writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. Among other things, it affords a remedy through a writ of habeas corpus to persons in custody in violation of the Constitution or laws or treaties of the United States.

[6] Enactment of the INA § 106(a)(10) habeas remedy did not supplant the district court's general habeas corpus jurisdiction under 28 U.S.C. § 2241. Section 106 was enacted in 1961, after which we held that district courts had jurisdiction under *both* INA § 106(a)(10) and 28 U.S.C. § 2241 to review a final order of deportation, including the denial of discretionary relief pursuant to INA § 212(c). *Sotelo Mondragon v. Ilchert*, 653 F.2d 1254, 1255 (9th Cir. 1980).

not available in immigration cases when a right of direct review existed. *See Hose v. INS*, 141 F.3d 932, 935 (9th Cir. 1998). In *Hose*, the petitioner ignored her undisputed right to judicial review via a petition for review filed in this Court and instead filed a habeas petition under § 2241.

Hose considered the petitioner's claims in light of newly enacted INA § 242(g), which provides:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

INA § 242(g) (codified at 8 U.S.C. § 1252(g) (Supp. II 1996)).

In view of INA § 242(g), the court affirmed dismissal of the petition for lack of jurisdiction, stating:

> Except as provided in section 1252, federal courts are divested of all jurisdiction to hear any claim by any alien involving an immigration proceeding. This means that no federal court has jurisdiction to consider any such matter. Section 1252 gives this court jurisdiction to hear those claims by way of a petition for review of a final order of removal. 8 U.S.C. § 1252(b). Section 1252 does not give the district court jurisdiction to hear Hose's habeas petition. Not having been granted jurisdiction under section 1252, that jurisdiction is removed just as the statute says it is.

Hose, 141 F.3d at 935 (emphasis in original).

The court further explained in considering *Hose's* habeas petition that:

> Under IIRIRA, Congress has not attempted to preclude all federal court review of orders to exclude or remove aliens. Rather it has provided a streamlined approach for consideration by the courts of appeals of claims arising from those orders and the procedures leading to them.

Id. at 936.

Thus, *Hose* was decided in the context of an appeal of a discretionary administrative decision for which alternative judicial remedies existed. Magana-Pizano's habeas corpus petition arises under polar opposite conditions: he has raised colorable constitutional issues concerning his proposed deportation, but has no judicial remedy save habeas relief because he is subject to the transitional rules of IIRIRA and the judicial review provisions found at new INA § 242(a) and (b) are not available to him. In short, if we apply INA § 242(g) as construed by *Hose*[7] to Magana-Pizano, he has no means of judicial review. Thus, Magana-Pizano's petition presents the question of whether INA § 242(g), as inter-

---

[7] We employ the phrase "as construed by *Hose*" because other circuits have construed IIRIRA differently, *see Goncalves v. Reno*, 144 F.3d 110, 117 (1st Cir. 1998); *Jean-Baptiste v. Reno*, 144 F.3d 212, 218- 219 (2d Cir. 1998), and the Supreme Court has not as yet resolved the inter-circuit conflict. However, these considerations are irrelevant to our consideration because *Hose*'s construction is binding in this Circuit. *See Jeffries v. Wood*, 114 F.3d 1484, 1492 (9th Cir. 1997) ("Only an en banc panel may overturn existing Ninth Circuit precedent.")

preted by *Hose* and applied to cases such as the one before us, violates the Suspension Clause of the United States Constitution by denying habeas relief in cases where no other avenue of judicial review exists.

This was a question expressly reserved by *Hose*. In *Hose*, the court found no Suspension Clause violation because "Hose fail[ed] to establish how direct review of her claims by this court would be inadequate or ineffective." *Hose*, 141 F.3d at 936. However, the panel specifically noted that: "[w]e express no opinion on whether the statute violates the Suspension Clause as to aliens who then have no avenue of judicial review." *Id.* n. 3. (emphasis in original). *See Swain v. Pressley*, 430 U.S. 372, 381, 97 S. Ct. 1224, 51 L.Ed.2d 411 (1977) (finding no unconstitutional suspension of the Great Writ when a substitute procedure is available "which is neither inadequate nor ineffective to test the legality of a person's detention.").

The Suspension Clause provides that: "The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art I, § 9, cl. 2. Although we assess the writ which the Constitution protects against suspension "as it exists today, rather than as it existed in 1789," see *Felker v. Turpin*, 518 U.S. 651, 664, 116 S. Ct. 2333, 135 L.Ed.2d 827 (1996), historical perspective is important.

As Chief Justice Burger noted, the "traditional Great Writ was largely a remedy against executive detention." *Swain*, 430 U.S. at 386, 97 S.Ct. 1224 (Burger, C.J., concurring). Indeed, challenges to executive detention are at the "historical core of the Suspension

Clause." *Goncalves v. Reno*, 144 F.3d 110, 123 (1st Cir. 1998). The "most celebrated writ in the English law," according to Blackstone, was employed to test "all manner of illegal confinement." 3 William Blackstone, Commentaries *129, *131. The writ was used in England to test the validity of noncriminal custody "since at least the early seventeenth century." Jonathan L. Hafetz, Note, The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts, 107 Yale L.J. 2509, 2523 (1998). It eventually became a tool to challenge detention by the King. In *Darnel's Case*, 3 Howell's State Trials 1 (K.B.1627) (also known as *Case of Five Knights*), the writ was issued to test King Charles I's imprisonment of Sir Thomas Darnel and others for refusing to submit to the King's forced loan. Although the writ was ultimately denied, parliament responded by forcing King Charles to affirm the Petition of Right which abolished the King's power to imprison by special command without showing cause. William F. Duker, A Constitutional History of Habeas Corpus 43-44 (1980). Thus, even in the Seventeenth Century, judicial scrutiny of executive detention existed long before the right was ever articulated in a governing instrument such as the Constitution.

The English tradition of challenging executive detention by habeas corpus continued into American immigration jurisprudence. Aside from the Alien and Sedition Acts passed in 1798, Congress did not enact legislation restricting immigration until Page Law of 1875, 18 Stat 477, which proscribed the entry of prostitutes and "oriental" laborers brought into the United States involuntarily. Shortly thereafter, in May, 1882, Congress passed the Chinese Exclusion Act, 22 Stat 58, which forbade the immigration of Chinese laborers for

ten years. Numerous Chinese successfully challenged the application of the Exclusion Act through a habeas writ because they were citizens or residents of this country or otherwise outside of the Exclusion Act's jurisdictional reach. *See, e.g., In re Ah Sing*, 13 F. 286 (9th Cir. 1882); *In re Ah Tie*, 13 F. 291 (9th Cir. 1882); *In re Low Yam Chow*, 13 F. 605 (9th Cir. 1882). The volume of habeas petitions was substantial: from 1882 to 1890, Judge Ogden Hoffman of the Northern District of California heard an estimated 7,000 Chinese habeas corpus petitions alone. David C. Frederick, Rugged Justice: The Ninth Circuit Court of Appeals and the American West, 1891-1941 59 (1994).

In 1885, the notion that the remedy of habeas corpus was not available because immigration was solely within the executive prerogative was soundly rejected in *In re Jung Ah Lung*, 25 F. 141, 142-43 (D. Cal. 1885), a decision affirmed by both the Ninth Circuit and the Supreme Court. *See United States v. Jung Ah Lung*, 124 U.S. 621, 8 S. Ct. 663, 31 L.Ed. 591 (1888). In that case, after noting that the writ "has always been considered among English-speaking peoples the most sacred muniment of personal freedom," the court observed:

> The right to a writ of *habeas corpus* is the right to have the lawfulness of the restraint to which the petitioner is subjected inquired into by the courts; to be adjudged and determined by the law of the land. It has not as yet been committed to any purely executive officer. I am, therefore, clearly of the opinion that it is the duty of the "court justice or judge to whom such application (for a writ of *habeas*

> *corpus*) is made, to forthwith award writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto." Rev St. § 755. The performance of this duty the court is not at liberty, on any pretext, to evade. That on the return of the writ it is the duty of the court to inquire and determine whether the restraint is lawful, independently of any previous decision of the question by the collector or his deputy, or by the surveyor, or by the inspector of customs stationed on board the vessel.

Id. at 143-44 (italics and parenthetical reference in original). The Supreme Court affirmed, holding that the petitioner met the prerequisites for filing a writ, and that nothing in the Chinese Exclusion Act removed the writ. *Jung Ah Lung*, 124 U.S. at 626-32, 8 S. Ct. 663 ("We see nothing in these acts which in any manner affects the jurisdiction of the courts of the United States to issue a writ of habeas corpus.") A subsequent attempt to limit the jurisdictional implications of the decision was rejected in *United States v. Chung Shee*, 76 F. 951, 955-56 (9th Cir. 1896).

Subsequent to 1882, Congress passed a number of immigration laws which provided increased restrictions on judicial review, including the Immigration Act of 1891, 26 Stat. 1084, the Immigration Act of 1907, 34 Stat 898, and the Immigration Act of 1917, 39 Stat. 897. The Supreme Court sustained the restrictions on judicial review of discretionary decisions, in the process drawing for the first time the distinction between aliens seeking admission to the United States and aliens already legally present and wishing to stay. *See, e.g., Ekiu v. United States*, 142 U.S. 651, 12 S. Ct. 336, 35

L.Ed. 1146 (1892) (holding that Congress' plenary power to regulate immigration supplanted any procedural due process rights of arriving aliens subject to exclusion proceedings); *United States v. Ju Toy*, 198 U.S. 253, 25 S. Ct. 644, 49 L.Ed. 1040 (1905) (assuming arguendo that an alien seeking admission has Fifth Amendment due process rights, those rights do not require a judicial trial as to the grounds for denial of entrance). However, throughout this period, the courts entertained challenges to executive immigration decisions through the remedy of habeas corpus. *See U.S. v. Chin Len*, 187 F. 544, 549 (2d Cir. 1911) (an alien denied entry despite his valid claim of citizenship may properly challenge the fairness of his hearing by means of habeas corpus); *U.S. v. Tsuji*, 199 F. 750 (9th Cir. 1912) (habeas corpus affords a remedy against the action of immigration officers, where they exceed their power or authority, although their decisions on questions of fact are final and not reviewable.).

In considering the Immigration Act of 1917, the Supreme Court wrote that the Act "clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution." *Heikkila v. Barber*, 345 U.S. 229, 234-35, 73 S. Ct. 603, 97 L.Ed. 972 (1953). After concluding an alien's rights were not enlarged by enactment of the Administrative Procedure Act, the court acknowledged the role of habeas corpus relief, noting that: "Now, as before, he may attack a deportation order only by habeas corpus." *Id.* at 235, 73 S. Ct. 603. Thus, even under legislation which intended to restrict all judicial

review except as constitutionally required, the remedy of habeas corpus remained.[8]

From 1953 to 1961, habeas corpus remained the primary remedy in immigration cases. With enactment of amendments to the INA in 1961, Congress established a base grant of judicial review through petitions for review of final deportation orders, and established a new specific habeas remedy in INA § 106(a)(10). Following passage of various interim measures, including the Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359, AEDPA and IIRIRA present the next major development in the evolution of judicial review of immigration decisions, including the repeal of INA § 106.[9]

---

[8] Some courts have suggested that *Heikkila's* habeas umbrella covers only narrow specific due process claims. This reading ignores cases decided subsequent to *Heikkila* in which Supreme Court reviewed both statutory and other constitutional claims. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268, 74 S. Ct. 499, 98 L.Ed. 681 (1954) (due process includes the right to have the decision-maker abide by applicable regulations); *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 77-79, 77 S. Ct. 618, 1 L.Ed.2d 652 (1957) (reviewing the Board of Immigration Appeals' discretionary denial of an application for suspension of deportation for an abuse of discretion). Moreover, the reference to due process in *Heikkila* related to the scope of review on habeas of an agency's factual determinations, not the entire range of permissible claims not presented by the facts of that case. *See Heikkila*, 345 U.S. at 236, 73 S. Ct. 603.

[9] Despite the repeated mantra that Congress' power over immigration is plenary, an exception has been consistently recognized for those lawful aliens already present in the country and subject to deportation rather than exclusion. The Supreme Court explained that these aliens have procedural due process rights of a more traditional nature because "once an alien gains admission to our country and begins to develop the ties that go with permanent

Hose interpreted IIRIRA as eliminating all forms of judicial review in immigration cases, including the remedy of habeas corpus. *Hose*, 141 F.3d at 935 ("No federal court has jurisdiction to consider any such matter."). Although we are mindful of our obligation to interpret the statute in a manner that renders it constitutionally valid, *see U.S. v. Henson*, 123 F.3d 1226, 1232 (9th Cir. 1997), *Hose's* statutory construction is binding upon us, even if we were inclined to interpret IIRIRA in a way that passes constitutional muster. *See United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1292 (9th Cir. 1992), *rev'd on other grounds*, 513 U.S. 64, 115 S. Ct. 464, 130 L.Ed.2d 372 (1994).

Thus, we must squarely face the issue of whether INA § 242(g) as construed by *Hose* and applied to the case at hand violates the Suspension Clause. Given the history of the writ, both in England and as applied in

---

residence, his constitutional status changes accordingly." *Landon v. Plasencia*, 459 U.S. 21, 32, 103 S. Ct. 321, 74 L.Ed.2d 21 (1982). *See also Ramirez-Durazo v. INS*, 794 F.2d 491, 496 (9th Cir. 1986) ("An alien in deportation proceedings is entitled to certain procedural protections and substantive rights not available in an exclusion proceeding."). This structure has been altered by IIRIRA; all proceedings have been consolidated into a single process now known as "removal" proceedings. See INA § 239(a), 8 U.S.C. § 1229(a) (Supp. 1998). This procedural restructuring does not by itself expand or contract the constitutional protections previously recognized in our immigration jurisprudence. *See Harman v. Forssenius*, 380 U.S. 528, 540, 85 S. Ct. 1177, 14 L.Ed.2d 50 (1965) ("Constitutional rights would be of little value if they could be . . . indirectly denied."); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829, 115 S. Ct. 1842, 131 L.Ed.2d 881 (1995) ("The Constitution 'nullifies sophisticated as well as simple-minded modes' of infringing on Constitutional protections.").

immigration cases in the United States, the answer must plainly be in the affirmative. Indeed, that conclusion is compelled by *Heikkila*. If in enacting IIRIRA Congress intended to preclude judicial review in immigration cases "except insofar as it was required by the Constitution," *Id.* at 234 then *Heikkila* provides the judicial response: "[n]ow, as before," a petitioner may attack a deportation order by habeas corpus. *Id.* at 235. Simply put, elimination of all judicial review of executive detention violates the Constitution.

B

Determining that Congress may not constitutionally repeal all forms of habeas relief in immigration cases without offending the Suspension Clause does not fully resolve the question at hand. The scope of habeas relief which the Constitution protects against suspension has been long debated. *See* Lenni B. Benson, Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings, 29 Conn. L. Rev. 1411, 1474-78 (1997).

The Constitution itself "does not expressly provide a grant of jurisdiction to hear habeas petitions; rather, the Constitution preserves access to habeas corpus in the Suspension Clause." *Id.* at 1474. However, "[s]ince *Ex Parte Bollman*, it has generally been accepted that the intent of the habeas clause was somehow to guarantee a federal writ of habeas corpus." Duker, *supra* at 126. In *Bollman*, the presence of a constitutional imperative coupled with the absence of an expressly defined right was interpreted by Chief Justice Marshall as circumstance compelling congressional action. *See Ex parte Bollman*, 4 Cranch 75, 8 U.S. 75, 95, 2 L.Ed.

554 (1807) ("Acting under the immediate influence of this injunction, [Congress] must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity. . . ."). Thus, Chief Justice Marshall implied a duty upon Congress to provide for the writ, noting that, "for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted." *Id.*; *see also Stewart v. Martinez-Villareal*, — U.S. ——, 118 S. Ct. 1618, 1622, 140 L.Ed.2d 849 (1998) ("It is axiomatic that 'the power to award the writ of habeas corpus by any of the courts of the United States, must be given by written law.'") (Scalia, J., dissenting).

If Congress had expressly chosen to repeal all statutory habeas, then we would be faced with the thorny problem of defining the contours of the "free standing" constitutional writ. *See Kolster v. INS*, 101 F.3d 785, 790 n. 1 (1st Cir. 1996). Fortunately, we are not confronted with that circumstance. Neither AEDPA nor IIRIRA expressly refer to statutory habeas corpus relief pursuant to 28 U.S.C. § 2241. Thus, this is not an instance of express statutory repeal. *Moyle v. Director, OWCP*, 147 F.3d 1116, n.4 (9th Cir. 1998). The base habeas statute, 28 U.S.C. § 2241, which is the modern descendant of legislation passed by the First Congress of the United States, 1 U.S. Statutes at large 73, 81-82, remains. *Hose's* construction of IIRIRA forfended access to relief under 28 U.S.C. § 2241 in immigration cases alone. Because the Suspension Clause forbids that application in this case, IIRIRA's impediment to the general habeas remedies of 28 U.S.C. § 2241 is removed for Magana-Pizano and those similarly situ

ated. Thus, because Congress has chosen to implement the general right of habeas relief through 28 U.S.C. § 2241, we conclude that to the extent habeas remedies in immigration cases are protected by the Suspension Clause, relief is afforded through the statutory remedy of 28 U.S.C. § 2241.

This result is consistent with the historical treatment of habeas corpus in immigration cases. At the time when judicial review was congressionally limited "except insofar as it was required by the Constitution," *Heikkila*, 345 U.S. at 234, 73 S. Ct. 603, habeas relief was granted under the general habeas statute, not a common law writ. *See United States ex. rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499, 98 L.Ed. 681 (1954).

Our conclusion is also consistent with the requirement that judicial review of constitutional claims not be foreclosed. *See Webster* v. *Doe*, 486 U.S. 592, 603, 108 S. Ct. 2047, 100 L.Ed.2d 632 (1988) ("serious constitutional question [s] . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."). The BIA lacks jurisdiction to adjudicate constitutional issues. *See Wang v. Reno*, 81 F.3d 808, 814 n. 7 (9th Cir. 1996); *Bagues-Valles v. INS*, 779 F.2d 483, 484 (9th Cir. 1985). Accordingly, under *Hose's* construction, INA § 242(g) would prevent Magana-Pizano from presenting his constitutional claims before any tribunal, administrative or judicial, far short of providing a procedure "which is neither inadequate nor ineffective to test the legality of a person's detention." *Swain*, 430 U.S. at 381, 97 S.Ct. 1224.

Because section 2241 habeas relief is limited to persons in custody in violation of the Constitution or laws or treaties of the United States, it is, as we have noted, more narrow than habeas relief previously available under INA § 106. However, Magana-Pizano's petition clearly states a claim under 28 U.S.C. § 2241. He has made a colorable argument that his deportation would violate the Equal Protection and Due Process Clauses, and that his deportation is forbidden by United States statute. Thus, the gravamen of his action does not fall within the rubric of purely discretionary challenges, which some courts have held outside the scope of section 2241. *See*, e.g., *Yang v. INS*, 109 F.3d 1185, 1195 (7th Cir. 1997).

The INS contends that if habeas corpus review remains under 28 U.S.C. § 2241, it must be limited to situations in which there is a threat of a "fundamental miscarriage of justice." No such limitation appears in 28 U.S.C. § 2241, and we decline to assume a legislative role and insert additional statutory language. Section 2241 has a long and storied history, and its standards are well-developed and known. The "fundamental miscarriage of justice" requirements have been imposed judicially only in cases of successive petitions where the abuse of the writ doctrine would otherwise bar a subsequent petition. *See, e.g., Herrera v. Collins*, 506 U.S. 390, 404, 113 S. Ct. 853, 122 L.Ed.2d 203 (1993) and *Sawyer v. Whitley*, 505 U.S. 333, 339, 112 S. Ct. 2514, 120 L.Ed.2d 269 (1992). Neither Congress nor the courts have imposed a "fundamental miscarriage of justice" requirement in a first habeas petition, and there is no statutory or judicial basis for doing so here. Thus, if a first-time habeas corpus petitioner is "in custody in violation of the Constitution or laws or

treaties of the United States," the petitioner is entitled to habeas corpus relief. 28 U.S.C. § 2241(c)(3).

Accordingly, because the Suspension Clause prevents IIRIRA from foreclosing access to general statutory habeas relief in this case, Magana-Pizano may pursue his remedies under 28 U.S.C. § 2241.

IV

The INS argues that to the extent the federal courts have any jurisdiction over Magana-Pizano's habeas petition, such jurisdiction lies with the Court of Appeals. However, the plain language of 28 U.S.C. § 2241 provides an unambiguous grant of jurisdiction to the district courts, stating, "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241(a) (1994). We are aware of the general concerns surrounding a bifurcated system of review. However, bifurcated review of immigration matters has been the norm, not the exception. *Compare Foti v. INS*, 375 U.S. 217, 221, 84 S. Ct. 306, 11 L.Ed.2d 281 (1963) (Court of Appeals review of discretionary relief) and *Giova v. Rosenberg*, 379 U.S. 18, 85 S. Ct. 156, 13 L.Ed.2d 90 (1964) (Court of Appeals review of motion to reopen), with *Cheng Fan Kwok v. INS*, 392 U.S. 206, 216, 88 S. Ct. 1970, 20 L.Ed.2d 1037 (1968) (district court review of denial of stay of deportation). Moreover, it is appropriate that any evidentiary hearings with respect to habeas matters take place at the district court level which is uniquely positioned to handle such issues and develop the appropriate record. *American-Arab Anti-Discrimination Committee v. Reno*, 119 F.3d 1367, 1373

(9th Cir. 1997), *cert. granted*, — U.S. ——, 118 S. Ct. 2059, 141 L.Ed.2d 137 (1998). Magana-Pizano's petition raises factual questions which are best committed to the wisdom of the district court for resolution.

Regardless of these policy considerations, in the end the choice of jurisdictional assignment is a Congressional one, and Congress vested the district courts with the power to review habeas corpus petitions. It is not only a proper choice, but one which we lack the power to judicially divest.

V

In summary, we deny Magana-Pizano's petition for review for lack of jurisdiction. We reverse the district court's dismissal of Magana-Pizano's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 for lack of jurisdiction, and remand the case to the district court with instructions to proceed to the merits of the petition. We award Magana-Pizano his costs on appeal, but the question of attorney fees is reserved until the district court decides the merits of the petition.

PETITION FOR REVIEW DISMISSED; JUDGMENT REVERSED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 97-15678, 97-70384

DANIEL MAGANA-PIZANO, PETITIONER-APPELLANT

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLEE

Argued and Submitted Aug. 12, 1997
Decided Sept. 1, 1998

Appeal from the United States District Court for the District of Arizona; Stephen M. McNamee, District Judge, Presiding. D.C. No. CV 97-00619 SMM.

Before: GOODWIN and THOMAS, Circuit Judges, PREGERSON,* District Judge.

PER CURIAM.

With enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act

---

* The Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

of 1996 ("IIRIRA"), Congress dramatically altered our immigration laws and judicial remedies for immigrants facing deportation or exclusion. To consider the proper jurisdiction for habeas corpus petitions and petitions for review of Board of Immigration Appeals decisions under the new statutes, we consolidated these actions. We dismiss the petition for review for lack of jurisdiction, but hold that the petitioner may pursue habeas corpus relief under 28 U.S.C. § 2241 in the United States District Court.

I

Daniel Magana-Pizano is a 25-year old native and citizen of Mexico who entered the United States on December 28, 1977, as the five-year old child of a lawful permanent resident. Magana-Pizano's parents and three of his siblings are lawful permanent residents of the United States; his fourth sibling is a United States citizen. Since his admission into the United States, Magana-Pizano has resided in Southern California and Arizona. He attended high school in the United States, and most recently worked as a fork lift operator.

His past includes a criminal history, albeit for mostly minor offenses. Relevant to this appeal, he was convicted in February 1995 in a California state court of being under the influence of cocaine and methamphetamine in violation of section 11550(a) of the California Health and Safety Code, a misdemeanor offense.

On May 17, 1996, the Immigration and Naturalization Service ("INS") issued an Order to Show Cause[1] to

[1] The Order to Show Cause alleged that Magana-Pizano was deportable under INA § 241(a)(2)(B)(i), codified at 8 U.S.C. § 1251

Magana-Pizano alleging that he was deportable as a result of this misdemeanor criminal conviction. At his deportation hearing, Magana-Pizano conceded his deportability as a result of the drug conviction, but indicated that he would apply for a discretionary waiver of deportation under Section 212(c) of the Immigration and Nationality Act ("INA").

Unbeknownst to Magana-Pizano, Congress had already passed AEDPA, Pub.L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 15, 18, 22, 28, 40, 42, 50 U.S.C.). Section 440(d) of AEDPA amended INA § 212(c) to eliminate discretionary relief for aliens convicted of most drug-related crimes, including Magana-Pizano's.[2] As a result of this

---

(1994) (redesignated by IIRIRA § 305(a)(2) as INA § 237(a)(2)(i), to be codified at 8 U.S.C. § 1227(a)(2)(B)(i) (Supp. II 1996)). This section provides that "[a]ny alien who at any time after entry has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is deportable."

[2] Section 440(d) of AEDPA modifies 8 U.S.C. § 1182(c) to provide that the Attorney General no longer has the authority to waive deportation of aliens convicted of certain crimes, such as those involving controlled substances. It provides:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(c)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion in him under section 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of

statutory change, the INS filed a motion to pretermit Magana-Pizano's application for relief under INA § 212(c), arguing that section 440(d) of AEDPA and its amendment to section 212(c) were effective as of the date of passage on April 24, 1996. These changes provided that any alien who, like Magana-Pizano, was deportable due to a criminal conviction under 8 U.S.C. § 1251(a)(2)(B), was statutorily ineligible for discretionary relief.

The Immigration Judge granted the INS motion to pretermit Magana-Pizano's application and ordered Magana-Pizano deported to Mexico. Magana-Pizano appealed this decision to the Board of Immigration Appeals ("BIA"), which sustained the deportation order based on AEDPA changes to INA § 212(c), and the Attorney General's opinion in *Matter of Soriano*, Int. Dec. 3289 (A.G. Feb. 21, 1997). Magana-Pizano filed a timely petition for review of the BIA's decision with this Court.

Magana-Pizano also filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the United States District Court for the District of Arizona. In his habeas petition, he argued that the BIA's decision and interpretation of AEDPA section 440(d) violated the Equal Protection Clause of the Constitution. The district court dismissed the complaint

---

having committed any criminal offense covered in section 1251(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1251(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 1251(a)(2)(A)(i) of this title.

without prejudice for lack of jurisdiction, explaining that the statutory basis for habeas review for aliens in custody pursuant to an order of deportation was repealed by a different section of AEDPA. *See* AEDPA § 401(e), repealing 8 U.S.C. § 1105a(a)(10). Magana-Pizano filed a timely appeal of that decision to this Court. We sua sponte consolidated both matters.

II

We first address Magana-Pizano's petition for review of the BIA decision holding that he was ineligible for discretionary relief under INA § 212(c). Magana-Pizano challenges the BIA's interpretation of AEDPA section 440(d) and its applicability to his case. We cannot reach the merits, however, because of new limitations that Congress has placed on our ability to hear such claims.

Prior to passage of IIRIRA, Pub.L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), as amended by Act of Oct. 11, 1996, Pub.L. No. 104-302, 110 Stat. 3656, the United States Court of Appeals was the proper tribunal for parties who wished judicial review of a BIA decision. *See* INA § 106(a), 8 U.S.C. § 1105a (1994) (repealed 1996). That now-repealed INA section provided that an alien could obtain judicial review by the appropriate court of appeals after entry of a final order of deportation.

Petitions for review filed between the passage of IIRIRA on September 30, 1996, and IIRIRA's general effective date of April 1, 1997, are governed by interim transitional rules. *See* IIRIRA § 309(c); *Kalaw v. INS*,

133 F.3d 1147, 1150 (9th Cir. 1997).[3] Because the BIA's decision holding Magana-Pizano statutorily ineligible for relief was issued March 17, 1997, IIRIRA's transitional provisions apply to his case. *See* IIRIRA § 309(c)(4); *Kalaw*, 133 F.3d at 1150.[4]

Section 309(c)(4)(G) provides:

> there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

---

[3] The scope and validity of the permanent changes made by IIRIRA are not before us and we therefore decline to address those issues.

[4] IIRIRA's jurisdictional changes are still subject to the judicial presumption against retroactive application of new legislation to pending cases. *See Hughes Aircraft Co. v. U.S. ex rel Schumer*, 520 U.S. 939, 117 S. Ct. 1871, 1878, 138 L.Ed.2d 135 (1997) ("[t]he fact that courts often apply newly enacted jurisdiction-allocating statutes to pending cases merely evidences certain limited circumstances failing to meet the conditions for our generally applicable presumption against retroactivity, not an exception to the rule itself."); *LaFontant v. INS*, 135 F.3d 158, 163 (D.C. Cir.1998) ("the Supreme Court has clearly established the principle that in determining retroactivity, jurisdictional statutes are to [be] evaluated in the same manner as any other statute.")

The INS concedes that this Court nonetheless retains a limited scope of judicial review for aliens who are deportable for criminal offenses enumerated in section 309(c)(4)(G) of IIRIRA—"[to] determine for itself whether the petitioner is (i) an alien (ii) deportable (iii) by reason of a criminal offense listed in the statute." *Yang v. INS*, 109 F.3d 1185, 1192 (7th Cir. 1997), *cert. denied*, — U.S. ——, 118 S. Ct. 624, 139 L.Ed.2d 605 (1997). Magana-Pizano does not dispute that he is an alien deportable by reason of having committed one of the enumerated crimes. Rather, he argues that the Immigration Judge's and BIA's reading of AEDPA § 440(d) constitute an impermissible retroactive application of the amended statute.

Congress evidenced a specific intent for IIRIRA to apply retroactively to pending cases simply by virtue of its creation of transitional rules. *See* IIRIRA § 309(c). To this end, we note that this Court had jurisdiction to review certain final orders of deportation "only because Congress had conferred it." *Duldulao v. INS*, 90 F.3d 396, 399-400 (9th Cir. 1996); *see also Carlson v. Landon*, 342 U.S. 524, 537, 72 S. Ct. 525, 96 L.Ed. 547 (1952) ("The power to expel aliens, being essentially a power of the political branches of government, the legislative and the executive, may be exercised entirely through executive officers, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.") (internal quotation marks and footnote omitted)). Because Magana-Pizano's arguments are not within the narrow scope of this Court's review on direct appeal under IIRIRA's transitional rules, we dismiss his petition for review for lack of jurisdiction.

III

A

The district court denied Magana-Pizano's habeas corpus petition after concluding that the statutory basis for habeas review for aliens in custody pursuant to an order of deportation had been repealed by AEDPA. We agree that one avenue has been eliminated, but hold that the district court retains jurisdiction under 28 U.S.C. § 2241 when the petitioner has no other judicial remedy. Thus, we reverse the judgment of the district court.

Prior to the passage of AEDPA and IIRIRA, aliens wishing to challenge the constitutionality of a final order of deportation via habeas corpus did so using one of two general methods: (1) proceeding pursuant to INA § 106(a)(10); or (2) proceeding pursuant to the general statutory habeas provision of 28 U.S.C. § 2241.[5] Prior to its repeal by AEDPA, INA § 106(a) provided the primary means of habeas review because its scope was broader than 28 U.S.C. § 2241.[6] Magana-Pizano filed his habeas petition pursuant to 28 U.S.C. § 2241.

---

[5] 28 U.S.C. § 2241 provides that writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. Among other things, it affords a remedy through a writ of habeas corpus to persons in custody in violation of the Constitution or laws or treaties of the United States.

[6] Enactment of the INA § 106(a)(10) habeas remedy did not supplant the district court's general habeas corpus jurisdiction under 28 U.S.C. § 2241. Section 106 was enacted in 1961, after which we held that district courts had jurisdiction under *both* INA § 106(a)(10) and 28 U.S.C. § 2241 to review a final order of deportation, including the denial of discretionary relief pursuant to INA

We had previously expressly declined to decide the scope of habeas remaining after passage of AEDPA. *See Duldulao*, 90 F.3d at 400 n. 4. However, we recently decided that the remedy of habeas corpus was not available in immigration cases when a right of direct review existed. *See Hose v. INS*, 141 F.3d 932, 935 (9th Cir. 1998). In *Hose*, the petitioner ignored her undisputed right to judicial review via a petition for review filed in this Court and instead filed a habeas petition under § 2241.

Hose considered the petitioner's claims in light of newly enacted INA § 242(g), which provides:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

INA § 242(g) (codified at 8 U.S.C. § 1252(g) (Supp. II 1996)).

In view of INA § 242(g), the court affirmed dismissal of the petition for lack of jurisdiction, stating:

> Except as provided in section 1252, federal courts are divested of all jurisdiction to hear any claim by any alien involving an immigration proceeding. This means that no federal court has jurisdiction to consider any such matter. Section 1252 gives this court jurisdiction to hear those claims by way of a petition

---

§ 212(c). *Sotelo Mondragon v. Ilchert*, 653 F.2d 1254, 1255 (9th Cir. 1980).

> for review of a final order of removal. 8 U.S.C. § 1252(b). Section 1252 does not give the district court jurisdiction to hear Hose's habeas petition. Not having been granted jurisdiction under section 1252, that jurisdiction is removed just as the statute says it is.

Hose, 141 F.3d at 935 (emphasis in original).

The court further explained in considering *Hose's* habeas petition that:

> Under IIRIRA, Congress has not attempted to preclude all federal court review of orders to exclude or remove aliens. Rather it has provided a streamlined approach for consideration by the courts of appeals of claims arising from those orders and the procedures leading to them.

Id. at 936.

Thus, *Hose* was decided in the context of an appeal of a discretionary administrative decision for which alternative judicial remedies existed. Magana-Pizano's habeas corpus petition arises under polar opposite conditions: he has raised colorable constitutional issues concerning his proposed deportation, but has no judicial remedy save habeas relief because he is subject to the transitional rules of IIRIRA and the judicial review provisions found at new INA § 242(a) and (b) are not available to him. In short, if we apply INA § 242(g) as construed by *Hose*[7] to Magana-Pizano, he has no means

---

[7] We employ the phrase "as construed by *Hose*" because other circuits have construed IIRIRA differently, *see Goncalves v. Reno*, 144 F.3d 110, 117 (1st Cir. 1998); *Jean-Baptiste v. Reno*, 144 F.3d 212, 218- 219 (2d Cir. 1998), and the Supreme Court has not as yet

of judicial review. Thus, Magana-Pizano's petition presents the question of whether INA § 242(g), as interpreted by *Hose* and applied to cases such as the one before us, violates the Suspension Clause of the United States Constitution by denying habeas relief in cases where no other avenue of judicial review exists.

This was a question expressly reserved by *Hose*. In *Hose*, the court found no Suspension Clause violation because "Hose fail[ed] to establish how direct review of her claims by this court would be inadequate or ineffective." *Hose*, 141 F.3d at 936. However, the panel specifically noted that: "[w]e express no opinion on whether the statute violates the Suspension Clause as to aliens who then have no avenue of judicial review." *Id.* n. 3. (emphasis in original). *See Swain v. Pressley*, 430 U.S. 372, 381, 97 S. Ct. 1224, 51 L.Ed.2d 411 (1977) (finding no unconstitutional suspension of the Great Writ when a substitute procedure is available "which is neither inadequate nor ineffective to test the legality of a person's detention.").

The Suspension Clause provides that: "The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art I, § 9, cl. 2. Although we assess the writ which the Constitution protects against suspension "as it exists today, rather than as it existed in 1789," see *Felker v. Turpin*, 518

---

resolved the inter-circuit conflict. However, these considerations are irrelevant to our consideration because *Hose*'s construction is binding in this Circuit. *See Jeffries v. Wood*, 114 F.3d 1484, 1492 (9th Cir. 1997) ("Only an en banc panel may overturn existing Ninth Circuit precedent.")

U.S. 651, 664, 116 S. Ct. 2333, 135 L.Ed.2d 827 (1996), historical perspective is important.

As Chief Justice Burger noted, the "traditional Great Writ was largely a remedy against executive detention." *Swain*, 430 U.S. at 386, 97 S.Ct. 1224 (Burger, C.J., concurring). Indeed, challenges to executive detention are at the "historical core of the Suspension Clause." *Goncalves v. Reno*, 144 F.3d 110, 123 (1st Cir. 1998). The "most celebrated writ in the English law," according to Blackstone, was employed to test "all manner of illegal confinement." 3 William Blackstone, Commentaries *129, *131. The writ was used in England to test the validity of noncriminal custody "since at least the early seventeenth century." Jonathan L. Hafetz, Note, The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts, 107 Yale L.J. 2509, 2523 (1998). It eventually became a tool to challenge detention by the King. In *Darnel's Case*, 3 Howell's State Trials 1 (K.B.1627) (also known as *Case of Five Knights*), the writ was issued to test King Charles I's imprisonment of Sir Thomas Darnel and others for refusing to submit to the King's forced loan. Although the writ was ultimately denied, parliament responded by forcing King Charles to affirm the Petition of Right which abolished the King's power to imprison by special command without showing cause. William F. Duker, A Constitutional History of Habeas Corpus 43-44 (1980). Thus, even in the Seventeenth Century, judicial scrutiny of executive detention existed long before the right was ever articulated in a governing instrument such as the Constitution.

The English tradition of challenging executive detention by habeas corpus continued into American

immigration jurisprudence. Aside from the Alien and Sedition Acts passed in 1798, Congress did not enact legislation restricting immigration until Page Law of 1875, 18 Stat 477, which proscribed the entry of prostitutes and "oriental" laborers brought into the United States involuntarily. Shortly thereafter, in May, 1882, Congress passed the Chinese Exclusion Act, 22 Stat 58, which forbade the immigration of Chinese laborers for ten years. Numerous Chinese successfully challenged the application of the Exclusion Act through a habeas writ because they were citizens or residents of this country or otherwise outside of the Exclusion Act's jurisdictional reach. *See, e.g., In re Ah Sing*, 13 F. 286 (9th Cir. 1882); *In re Ah Tie*, 13 F. 291 (9th Cir. 1882); *In re Low Yam Chow*, 13 F. 605 (9th Cir. 1882). The volume of habeas petitions was substantial: from 1882 to 1890, Judge Ogden Hoffman of the Northern District of California heard an estimated 7,000 Chinese habeas corpus petitions alone. David C. Frederick, Rugged Justice: The Ninth Circuit Court of Appeals and the American West, 1891-1941 59 (1994).

In 1885, the notion that the remedy of habeas corpus was not available because immigration was solely within the executive prerogative was soundly rejected in *In re Jung Ah Lung*, 25 F. 141, 142-43 (D. Cal. 1885), a decision affirmed by both the Ninth Circuit and the Supreme Court. *See United States v. Jung Ah Lung*, 124 U.S. 621, 8 S. Ct. 663, 31 L.Ed. 591 (1888). In that case, after noting that the writ "has always been considered among English-speaking peoples the most sacred muniment of personal freedom," the court observed:

> The right to a writ of *habeas corpus* is the right to have the lawfulness of the restraint to which the petitioner is subjected inquired into by the courts; to be adjudged and determined by the law of the land. It has not as yet been committed to any purely executive officer. I am, therefore, clearly of the opinion that it is the duty of the "court justice or judge to whom such application (for a writ of *habeas corpus*) is made, to forthwith award writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto." Rev St. § 755. The performance of this duty the court is not at liberty, on any pretext, to evade. That on the return of the writ it is the duty of the court to inquire and determine whether the restraint is lawful, independently of any previous decision of the question by the collector or his deputy, or by the surveyor, or by the inspector of customs stationed on board the vessel.

Id. at 143-44 (italics and parenthetical reference in original). The Supreme Court affirmed, holding that the petitioner met the prerequisites for filing a writ, and that nothing in the Chinese Exclusion Act removed the writ. *Jung Ah Lung*, 124 U.S. at 626-32, 8 S. Ct. 663 ("We see nothing in these acts which in any manner affects the jurisdiction of the courts of the United States to issue a writ of habeas corpus.") A subsequent attempt to limit the jurisdictional implications of the decision was rejected in *United States v. Chung Shee*, 76 F. 951, 955-56 (9th Cir. 1896).

Subsequent to 1882, Congress passed a number of immigration laws which provided increased restrictions on judicial review, including the Immigration Act of

1891, 26 Stat. 1084, the Immigration Act of 1907, 34 Stat 898, and the Immigration Act of 1917, 39 Stat. 897. The Supreme Court sustained the restrictions on judicial review of discretionary decisions, in the process drawing for the first time the distinction between aliens seeking admission to the United States and aliens already legally present and wishing to stay. *See, e.g., Ekiu v. United States*, 142 U.S. 651, 12 S. Ct. 336, 35 L.Ed. 1146 (1892) (holding that Congress' plenary power to regulate immigration supplanted any procedural due process rights of arriving aliens subject to exclusion proceedings); *United States v. Ju Toy*, 198 U.S. 253, 25 S. Ct. 644, 49 L.Ed. 1040 (1905) (assuming arguendo that an alien seeking admission has Fifth Amendment due process rights, those rights do not require a judicial trial as to the grounds for denial of entrance). However, throughout this period, the courts entertained challenges to executive immigration decisions through the remedy of habeas corpus. *See U.S. v. Chin Len*, 187 F. 544, 549 (2d Cir. 1911) (an alien denied entry despite his valid claim of citizenship may properly challenge the fairness of his hearing by means of habeas corpus); *U.S. v. Tsuji*, 199 F. 750 (9th Cir. 1912) (habeas corpus affords a remedy against the action of immigration officers, where they exceed their power or authority, although their decisions on questions of fact are final and not reviewable.).

In considering the Immigration Act of 1917, the Supreme Court wrote that the Act "clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution." *Heikkila v. Barber*, 345 U.S. 229, 234-35, 73 S. Ct. 603, 97 L.Ed. 972 (1953). After concluding an alien's rights were not enlarged by enactment of the

Administrative Procedure Act, the court acknowledged the role of habeas corpus relief, noting that: "Now, as before, he may attack a deportation order only by habeas corpus." *Id.* at 235, 73 S. Ct. 603. Thus, even under legislation which intended to restrict all judicial review except as constitutionally required, the remedy of habeas corpus remained.[8]

From 1953 to 1961, habeas corpus remained the primary remedy in immigration cases. With enactment of amendments to the INA in 1961, Congress established a base grant of judicial review through petitions for review of final deportation orders, and established a new specific habeas remedy in INA § 106(a)(10). Following passage of various interim measures, including the Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359, AEDPA and IIRIRA present the next major development in the evolution of

---

[8] Some courts have suggested that *Heikkila's* habeas umbrella covers only narrow specific due process claims. This reading ignores cases decided subsequent to *Heikkila* in which Supreme Court reviewed both statutory and other constitutional claims. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268, 74 S. Ct. 499, 98 L.Ed. 681 (1954) (due process includes the right to have the decision-maker abide by applicable regulations); *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 77-79, 77 S. Ct. 618, 1 L.Ed.2d 652 (1957) (reviewing the Board of Immigration Appeals' discretionary denial of an application for suspension of deportation for an abuse of discretion). Moreover, the reference to due process in *Heikkila* related to the scope of review on habeas of an agency's factual determinations, not the entire range of permissible claims not presented by the facts of that case. *See Heikkila*, 345 U.S. at 236, 73 S. Ct. 603.

judicial review of immigration decisions, including the repeal of INA § 106.[9]

Hose interpreted IIRIRA as eliminating all forms of judicial review in immigration cases, including the remedy of habeas corpus. *Hose*, 141 F.3d at 935 ("No federal court has jurisdiction to consider any such matter."). Although we are mindful of our obligation to interpret the statute in a manner that renders it constitutionally valid, *see U.S. v. Henson*, 123 F.3d 1226, 1232 (9th Cir. 1997), *Hose's* statutory construction is binding upon us, even if we were inclined to interpret IIRIRA in a way that passes constitutional muster. *See United*

---

[9] Despite the repeated mantra that Congress' power over immigration is plenary, an exception has been consistently recognized for those lawful aliens already present in the country and subject to deportation rather than exclusion. The Supreme Court explained that these aliens have procedural due process rights of a more traditional nature because "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." *Landon v. Plasencia*, 459 U.S. 21, 32, 103 S. Ct. 321, 74 L.Ed.2d 21 (1982). *See also Ramirez-Durazo v. INS*, 794 F.2d 491, 496 (9th Cir. 1986) ("An alien in deportation proceedings is entitled to certain procedural protections and substantive rights not available in an exclusion proceeding."). This structure has been altered by IIRIRA; all proceedings have been consolidated into a single process now known as "removal" proceedings. See INA § 239(a), 8 U.S.C. § 1229(a) (Supp. 1998). This procedural restructuring does not by itself expand or contract the constitutional protections previously recognized in our immigration jurisprudence. *See Harman v. Forssenius*, 380 U.S. 528, 540, 85 S. Ct. 1177, 14 L.Ed.2d 50 (1965) ("Constitutional rights would be of little value if they could be . . . indirectly denied."); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829, 115 S. Ct. 1842, 131 L.Ed.2d 881 (1995) ("The Constitution 'nullifies sophisticated as well as simple-minded modes' of infringing on Constitutional protections.").

States v. X-Citement Video, Inc., 982 F.2d 1285, 1292 (9th Cir. 1992), *rev'd on other grounds*, 513 U.S. 64, 115 S. Ct. 464, 130 L.Ed.2d 372 (1994).

Thus, we must squarely face the issue of whether INA § 242(g) as construed by *Hose* and applied to the case at hand violates the Suspension Clause. Given the history of the writ, both in England and as applied in immigration cases in the United States, the answer must plainly be in the affirmative. Indeed, that conclusion is compelled by *Heikkila*. If in enacting IIRIRA Congress intended to preclude judicial review in immigration cases "except insofar as it was required by the Constitution," *Id.* at 234, 73 S. Ct. 603, then *Heikkila* provides the judicial response: "[n]ow, as before," a petitioner may attack a deportation order by habeas corpus. *Id.* at 235, 73 S. Ct. 603. Simply put, elimination of all judicial review of executive detention violates the Constitution.

B

Determining that Congress may not constitutionally repeal all forms of habeas relief in immigration cases without offending the Suspension Clause does not fully resolve the question at hand. The scope of habeas relief which the Constitution protects against suspension has been long debated. *See* Lenni B. Benson, Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings, 29 Conn. L. Rev. 1411, 1474-78 (1997).

The Constitution itself "does not expressly provide a grant of jurisdiction to hear habeas petitions; rather, the Constitution preserves access to habeas corpus in

the Suspension Clause." *Id.* at 1474. However, "[s]ince *Ex Parte Bollman*, it has generally been accepted that the intent of the habeas clause was somehow to guarantee a federal writ of habeas corpus." Duker, *supra* at 126. In *Bollman*, the presence of a constitutional imperative coupled with the absence of an expressly defined right was interpreted by Chief Justice Marshall as circumstance compelling congressional action. *See Ex parte Bollman*, 4 Cranch 75, 8 U.S. 75, 95, 2 L.Ed. 554 (1807) ("Acting under the immediate influence of this injunction, [Congress] must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity. . . ."). Thus, Chief Justice Marshall implied a duty upon Congress to provide for the writ, noting that, "for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted." *Id.*; *see also Stewart v. Martinez-Villareal*, — U.S. ——, 118 S. Ct. 1618, 1622, 140 L.Ed.2d 849 (1998) ("It is axiomatic that 'the power to award the writ of habeas corpus by any of the courts of the United States, must be given by written law.'") (Scalia, J., dissenting).

If Congress had expressly chosen to repeal all statutory habeas, then we would be faced with the thorny problem of defining the contours of the "free standing" constitutional writ. *See Kolster v. INS*, 101 F.3d 785, 790 n. 1 (1st Cir. 1996). Fortunately, we are not confronted with that circumstance. Neither AEDPA nor IIRIRA expressly refer to statutory habeas corpus relief pursuant to 28 U.S.C. § 2241. Thus, this is not an instance of express statutory repeal. *Moyle v. Director, OWCP*, 147 F.3d 1116, (9th Cir. 1998). The base habeas statute, 28 U.S.C. § 2241, which is the modern des-

cendant of legislation passed by the First Congress of the United States, 1 U.S. Statutes at large 73, 81-82, remains. *Hose's* construction of IIRIRA forfended access to relief under 28 U.S.C. § 2241 in immigration cases alone. Because the Suspension Clause forbids that application in this case, IIRIRA's impediment to the general habeas remedies of 28 U.S.C. § 2241 is removed for Magana-Pizano and those similarly situated. Thus, because Congress has chosen to implement the general right of habeas relief through 28 U.S.C. § 2241, we conclude that to the extent habeas remedies in immigration cases are protected by the Suspension Clause, relief is afforded through the statutory remedy of 28 U.S.C. § 2241.

This result is consistent with the historical treatment of habeas corpus in immigration cases. At the time when judicial review was congressionally limited "except insofar as it was required by the Constitution," *Heikkila*, 345 U.S. at 234, 73 S. Ct. 603, habeas relief was granted under the general habeas statute, not a common law writ. *See United States ex. rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499, 98 L.Ed. 681 (1954).

Our conclusion is also consistent with the requirement that judicial review of constitutional claims not be foreclosed. *See Webster* v. *Doe*, 486 U.S. 592, 603, 108 S. Ct. 2047, 100 L.Ed.2d 632 (1988) ("serious constitutional question [s] . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."). The BIA lacks jurisdiction to adjudicate constitutional issues. *See Wang v. Reno*, 81 F.3d 808, 814 n. 7 (9th Cir. 1996); *Bagues-Valles v. INS*, 779 F.2d 483, 484 (9th Cir. 1985). Accordingly, under

Hose's construction, INA § 242(g) would prevent Magana-Pizano from presenting his constitutional claims before any tribunal, administrative or judicial, far short of providing a procedure "which is neither inadequate nor ineffective to test the legality of a person's detention." *Swain*, 430 U.S. at 381, 97 S.Ct. 1224.

Because section 2241 habeas relief is limited to persons in custody in violation of the Constitution or laws or treaties of the United States, it is, as we have noted, more narrow than habeas relief previously available under INA § 106. However, Magana-Pizano's petition clearly states a claim under 28 U.S.C. § 2241. He has made a colorable argument that his deportation would violate the Equal Protection and Due Process Clauses, and that his deportation is forbidden by United States statute. Thus, the gravamen of his action does not fall within the rubric of purely discretionary challenges, which some courts have held outside the scope of section 2241. *See*, e.g., *Yang v. INS*, 109 F.3d 1185, 1195 (7th Cir. 1997).

The INS contends that if habeas corpus review remains under 28 U.S.C. § 2241, it must be limited to situations in which there is a threat of a "fundamental miscarriage of justice." No such limitation appears in 28 U.S.C. § 2241, and we decline to assume a legislative role and insert additional statutory language. Section 2241 has a long and storied history, and its standards are well-developed and known. The "fundamental miscarriage of justice" requirements have been imposed judicially only in cases of successive petitions where the abuse of the writ doctrine would otherwise bar a subsequent petition. *See, e.g., Herrera v. Collins*, 506

U.S. 390, 404, 113 S. Ct. 853, 122 L.Ed.2d 203 (1993) and *Sawyer v. Whitley*, 505 U.S. 333, 339, 112 S. Ct. 2514, 120 L.Ed.2d 269 (1992). Neither Congress nor the courts have imposed a "fundamental miscarriage of justice" requirement in a first habeas petition, and there is no statutory or judicial basis for doing so here. Thus, if a first-time habeas corpus petitioner is "in custody in violation of the Constitution or laws or treaties of the United States," the petitioner is entitled to habeas corpus relief. 28 U.S.C. § 2241(c)(3).

Accordingly, because the Suspension Clause prevents IIRIRA from foreclosing access to general statutory habeas relief in this case, Magana-Pizano may pursue his remedies under 28 U.S.C. § 2241.

IV

The INS argues that to the extent the federal courts have any jurisdiction over Magana-Pizano's habeas petition, such jurisdiction lies with the Court of Appeals. However, the plain language of 28 U.S.C. § 2241 provides an unambiguous grant of jurisdiction to the district courts, stating, "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241(a) (1994). We are aware of the general concerns surrounding a bifurcated system of review. However, bifurcated review of immigration matters has been the norm, not the exception. *Compare Foti v. INS*, 375 U.S. 217, 221, 84 S. Ct. 306, 11 L.Ed.2d 281 (1963) (Court of Appeals review of discretionary relief) and *Giova v. Rosenberg*, 379 U.S. 18, 85 S. Ct. 156, 13 L.Ed.2d 90 (1964) (Court of Appeals review of motion to reopen), with *Cheng Fan*

Kwok v. INS, 392 U.S. 206, 216, 88 S. Ct. 1970, 20 L.Ed.2d 1037 (1968) (district court review of denial of stay of deportation). Moreover, it is appropriate that any evidentiary hearings with respect to habeas matters take place at the district court level which is uniquely positioned to handle such issues and develop the appropriate record. *American-Arab Anti-Discrimination Committee v. Reno*, 119 F.3d 1367, 1373 (9th Cir. 1997), *cert. granted*, — U.S. ——, 118 S. Ct. 2059, 141 L.Ed.2d 137 (1998). Magana-Pizano's petition raises factual questions which are best committed to the wisdom of the district court for resolution.

Regardless of these policy considerations, in the end the choice of jurisdictional assignment is a Congressional one, and Congress vested the district courts with the power to review habeas corpus petitions. It is not only a proper choice, but one which we lack the power to judicially divest.

V

In summary, we deny Magana-Pizano's petition for review for lack of jurisdiction. We reverse the district court's dismissal of Magana-Pizano's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 for lack of jurisdiction, and remand the case to the district court with instructions to proceed to the merits of the petition. We award Magana-Pizano his costs on appeal, but the question of attorney fees is reserved until the district court decides the merits of the petition.

PETITION FOR REVIEW DISMISSED; JUDGMENT REVERSED AND REMANDED.

APPENDIX C

UNITED STATES DISTRICT CIRCUIT
FOR THE DISTRICT OF ARIZONA

CIV-97-0619 PHX SMM

DANIEL PIZANO, PETITIONER

v.

ROSEANNE SONCHIK, RESPONDENT

Filed: Apr. 8, 1997

JUDGMENT

_____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

- XX Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus is dismissed without prejudice, petitioner to take nothing.

DATED at Phoenix, Arizona, this 8th day of April, 1997

RICHARD H. WEARE
Clerk of Court/DCE
By: /s/ T. CHAPMAN
Deputy Clerk
T. Chapman

CIV-21 (7/94)

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

April 7, 1997

Civil Minutes - General

Case No. 2:97-cv-00619

Title: Pizano v. Sonchik

DOCKET ENTRY

MINUTE ENTRY Judge Inits: SMM Crt Rptr: Mike Benitez. Appearances by Wendy Lestarge for pla and Hugh Milane and Cynthia Parsons for dft.

Oral argument is held on the motion for temporary restraining order to stay deportation by petitioner Daniel Magana Pizano [3-1]. The motion is denied on this case is dismissed without prejudice. The Clerk of Court shall enter argument accordingly.

[cc: CNSL/CK [12-1]

CASE ASSIGNED TO:
Hon. Stephen M McNamee, Judge

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ELOY, ARIZONA

A-35 822 607

In Deportation Proceedings

In the Matter of DANIEL MAGAÑA-PIZANO
Respondent

CHARGE: Section 241(a)(2)(B)(i) of the INA.

APPLICATION: Service Motion to Pretermit Application for Waiver under Section 212(c) of the Act.

ON BEHALF OF RESPONDENT:

Michael Franquinha, Esq.
343 W. Roosevelt St.
Phoenix, AZ 85003

ON BEHALF OF SERVICE:

Daniel Santander, Esq.
Asst. District Counsel
2035 N. Central Ave.
Phoenix, AZ 85004

MEMORANDUM DECISION AND ORDER OF THE IMMIGRATION JUDGE:

On May 17, 1996, the Service issued an Order to Show Cause charging the respondent with being deportable as articulated above. At a master calendar hearing conducted on August 14, 1996, the respondent admitted the allegations contained in the Order to Show Cause and conceded deportability as charged. Due to the respondent's admissions, the court finds the respondent deportable by clear, convincing and unequivocal evidence.

Upon further questioning the respondent indicated that he is a legal permanent resident alien who obtained such status as of 1977. To that event, respondent was invited to file an application for waiver under Section 212(c) of the Act, and an application was filed with the Court on September 25, 1996.

Under the old provisions of Section 212(c), the respondent would have been eligible to apply for a waiver of deportation. However, at approximately 12:00 pm MST on April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Public Law 104-132. This legislation significantly amended Section 212(c), and removed from eligibility those aliens who are "deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i). This provision of law apparently went into effect upon the signing of the law by President Clinton, and in this Court's opinion, applies to any application for relief

which is not administratively final as of the time and date of the signing.

Therefore, the court finds the respondent is ineligible for any relief from deportation due to the respondent's criminal conviction for a controlled substances violation. As there is no waiver available to the respondent, the Service's Motion to Pretermit the respondent's application for waiver under Section 212(c) will be granted. Additionally, the law requires the court to order the respondent's deportation from the United States to Mexico, the country designated by the respondent.

ORDER: It is the order of the court that the Service's Motion to Pretermit the respondent's application for waiver under Section 212(c) by granted.

FURTHER ORDER: It is the further order of this court that the respondent be deported to Mexico.

/s/ LEE ABBOTT Date: October 4, 1996
WILLIAM LEE ABBOTT
United States Immigration Judge
Eloy, Arizona

APPENDIX F

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A35-822-607 – ELO Date: MAR 14 1997

In re: MAGANA-PIZANO, DANIEL

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

MICHAEL FRANQUINHE
343 W. ROOSEVELT DR.,
PHOENIX, AZ 85003-0000

APPLICATION: Waiver of inadmissibility

ORDER:

PER CURIAM. You are seeking relief from deportation under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). However, you are

statutorily ineligible for such relief as an "alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)." *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA") § 440(d); *Matter of Soriano*, Interim Decision 3289 (A.G., Feb. 21, 1997). Accordingly, your appeal is dismissed.

/s/ _____
FOR THE BOARD

APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Suspension of Habeas Corpus Clause of the United States Constitution, Art. I, § 9, Cl. 2, provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

2. Prior to April 24, 1996, Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a) (1994), provided in pertinent part:

> **Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—
>
> * * * * *
>
> **(10) Habeas corpus**
>
> any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

3. After April 24, 1996, and before September 30, 1996, Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a), provided in pertinent part:

> **Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—
>
> * * * * *
>
> (10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered by section [1251](a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2)(A)(ii) for which both predicate offenses are covered by section [1251](a)(2)(A)(i), shall not be subject to review by any court.

4. Prior to April 24, 1996, Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), provided:

> **Nonapplicability of subsection (a)**
>
> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be ad-

mitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

5. Effective April 24, 1996,[1] Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), provided:

Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be ad-

---

[1] Section 212(c) was amended by Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277, on April 24, 1996. Further technical amendments were made by Section 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, on September 30, 1996, and those technical amendments were made effective as if they were enacted on the original enactment date of AEDPA. See p. 62a, *infra*. The version set forth in the text reflects both sets of amendments. In addition, Section 304(b) of IIRIRA, 110 Stat. 3009-597, repealed Section 212(c) entirely, but Sections 306 and 309 of IIRIRA, 110 Stat. 3009-607, 3009-625, make clear that this repeal applies only to aliens placed in removal proceedings on or after April 1, 1997. See pp. 61a-64a, *infra*.

mitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered by section [1251](a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2) (A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section [1251](a)(2)(A)(i).

6. Section 242 of the Immigration and Nationality Act, 8 U.S.C. 1252 (Supp. II 1996), provides in pertinent part:

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

* * * * *

(g) Exclusive jurisdiction

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

7. Section 401(e) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1268 (Apr. 24, 1996), provides:

> ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS.—Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a)) is amended—
>
> (1) in paragraph (8), by adding "and" at the end;
>
> (2) in paragraph (9), by striking "; and" at the end and inserting a period; and
>
> (3) by striking paragraph (10).

8. Section 440 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1276 (Apr. 24, 1996), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (Sept. 30, 1996),[2] provides in pertinent part:

CRIMINAL ALIEN REMOVAL.

---

[2] Section 306(d) of IIRIRA, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, made certain technical amendments to Section 440 of AEDPA, Pub. L. No. 104-132, 110 Stat. 1276, effective as if included in the original enactment of AEDPA. See p. 62a, *infra*.

(a) JUDICIAL REVIEW.—Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a(a)(10)) is amended to read as follows:

"(10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i), shall not be subject to review by any court."

* * * * *

(d) CLASSES OF EXCLUDABLE ALIENS.—Section 212(c) of such Act (8 U.S.C. 1182(c)) is amended—

(1) by striking "The first sentence of this" and inserting "This"; and

(2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)."

9. Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No.

104-208, Div. C, 110 Stat. 3009-597 (Sept. 30, 1996) provides:

> REPEAL OF SECTION 212(c).—Section 212(c) (8 U.S.C. 1182(c)) is repealed.

10. Section 306 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-607 (Sept. 30, 1996), as amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996),[3] provides in pertinent part:

> **APPEALS FROM ORDERS OF REMOVAL (NEW SECTION 242).**
>
> * * * * *
>
> (b) REPEAL OF SECTION 106.—Section 106 (8 U.S.C. 1105a) is repealed.
>
> (c) EFFECTIVE DATE.—
>
> (1) IN GENERAL.—Subject to paragraph (2), the amendments made by subsections (a) and (b) shall apply as provided under section 309, except that subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.
>
> * * * * *

---

[3] Public Law No. 104-302, 110 Stat. 3656 (Oct. 11, 1996) made certain technical amendments to Sections 306 and 309 of IIRIRA, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-607, 3009-625, effective as if enacted on the original date of enactment of IIRIRA.

(d) TECHNICAL AMENDMENT.—Effective as if included in the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104-132), subsections (a), (c), (d), (g), and (h) of section 440 of such Act are amended by striking "any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)" and inserting "any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)".

11. Section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-625 (Sept. 30, 1996), as amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996), provides in pertinent part:

EFFECTIVE DATES; TRANSITION.

(a) IN GENERAL.—Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

* * * * *

(c) TRANSITION FOR ALIENS IN PROCEEDINGS.—

(1) GENERAL RULE THAT NEW RULES DO NOT APPLY.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective date—

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

* * * * *

(4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW.—In the case in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary—

* * * * *

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense

covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

12. Section 2241 of Title 28, United States Code, provides in pertinent part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * * * *

(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * * * *

(3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]

APPENDIX H

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

Interim Decision #3289

In re Bartolome Jhonny Soriano, Respondent

File A39 186 067 - Napanoch

Decided June 27, 1996

Before: Board En Banc: SCHMIDT, Chairman; HEILMAN, HOLMES, VILLAGELIU, MATHON, and GUENDELSBERGER, Board Members. Concurring and Dissenting Opinion: ROSENBERG, Board Member. Dissenting Opinion: VACCA, Board Member, joined by DUNNE, Vice Chairman; HURWITZ, FILPPU, and COLE, Board Members.

HEILMAN, Board Member:

In a decision dated October 12, 1995, an Immigration Judge found the respondent deportable as charged, denied his application for a waiver of inadmissibility pursuant to section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994), and ordered him deported from the United States to the Dominican Republic. The respondent appealed from that decision

on October 23, 1995. Subsequent to the respondent's appeal, Congress amended section 212(c) of the Act, and the Immigration and Naturalization Service has now filed a supplemental brief in response to the respondent's argument, asserting that the recent legislative amendments preclude the respondent from demonstrating his continuing eligibility for section 212(c) relief.[1] Thus, we are faced with the issue regarding the effective date of section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1277 ("AEDPA"). We find the respondent eligible for section 212(c) relief, but will deny his appeal as a matter of discretion.

I. PROCEDURAL HISTORY

The respondent is a native and citizen of the Dominican Republic. He entered the United States on March 28, 1985, as a lawful permanent resident. On May 20, 1992, the respondent was convicted under the law of the State of New York of the offense of attempted criminal sale of a controlled substance. Based on this conviction, the Service initiated deportation proceedings against the respondent with the issuance of an Order to Show Cause and Notice of Hearing (Form I-221) dated June 3, 1994. On April 28, 1995, the respondent filed an Application for Advance Permission to Return to Unrelinquished Domicile (Form I-191) pursuant to section 212(c) of the Act. By order dated October 12, 1995, the Immigration Judge found that the respondent was eligible for relief under section 212(c) of the Act, but denied that application in the exercise of

---

[1] We acknowledge the contribution of amici in the briefing of this issue to the Board.

discretion. On appeal, the respondent argues that the Immigration Judge erred in the exercise of that discretion.

II. APPLICABLE LAW

Prior to considering the respondent's appeal of the Immigration Judge's discretionary determination, this Board must first address the Service's contention that the recent amendments to section 212(c) of the Act statutorily bar the Board from considering the merits of the respondent's appeal from his section 212(c) application. We note initially that the respondent was clearly eligible for such relief under the law in effect at the time the Immigration Judge rendered his decision.[2]

However, during the pendency of the respondent's appeal from the Immigration Judge's discretionary denial of his application, Congress amended section 212(c) of the Act to read as follows:

---

[2] Until April 24, 1996, section 212(c) of the Act read as follows:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of section (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion invested in [her] under section 211(b). The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of section (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion invested in [her] under section 211(b). *This section shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i).*

Section 440(d) of the AEDPA, 110 Stat. at 1277 (emphasis added).

The respondent, deportable by reason of having committed an offense covered by sections 241(a)(2)(A)(iii) and (B) of the Act, falls within the last sentence of the AEDPA amendment. Thus, we must decide whether Congress intended the respondent to remain eligible for section 212(c) relief after April 24, 1996.

III. EFFECTIVE DATE

Congress did not incorporate an express provision regarding the effective date of section 440(d) of the AEDPA. Initially, then, we must discern the date on which this section of law became effective, and, if effective immediately, whether it applies to those aliens

already in proceedings as of April 24, 1996. If it does so apply to those aliens in proceedings, we must further determine whether the amendment applies to those aliens who filed their section 212(c) applications by April 24, 1996. In resolving these issues of the AEDPA's temporal applicability, we first look to the language of the statute itself. We begin by noting that the paramount index of congressional intent is the plain meaning of the words used in the statute taken as a whole. *See Matter of Grinberg*, 20 I&N Dec. 911 (BIA 1994) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987)); *see also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (stating that in ascertaining the "plain meaning" of a statute, one "must look to the particular statutory language at issue, as well as the language and design of the statute as a whole").

A. SECTION 440(D) AND PENDING PROCEEDINGS

Initially, we find persuasive evidence to conclude that Congress intended section 440(d) to apply immediately, regardless of whether the Service had placed an alien in proceedings by April 24, 1996. Both general statutory construction and an examination of Congress' inclusion of other effective dates in the AEDPA lead us to this result. General rules of statutory construction hold that the lack of an effective date for legislation indicates that the law should be effective on the date of passage. *See generally* 2 C. Sands, *Sutherland Statutory Construction* § 33.08 (4th ed. 1973). We find no obstacle to the application of this rule in the language of the AEDPA; rather, we find such an interpretation buttressed by Congress' decision to expressly delay the effective date of other subsections of the AEDPA. For example, in section 414(b) of the AEDPA, 110 Stat. at

1270, Congress expressly provided that this amendment "shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of [the AEDPA]." Similarly, in section 442 of the AEDPA, 110 Stat. at 1280, Congress amended section 242A(b) of the Act with regard to certain procedural aspects of deportation hearings and stated, in subsection 442(d), that those amendments "shall apply to all aliens against whom deportation proceedings are initiated after the date of the enactment of [the AEDPA]." The absence of similar language in section 440(d) supports the conclusion that Congress intended section 440(d) of the AEDPA to apply to aliens already in proceedings on April 24, 1996. These express declarations in other subsections of the AEDPA, in conjunction with Congress' silence in section 440(d) of the AEDPA, lead us to conclude that section 440(d) was effective immediately upon enactment and was not limited in applicability to those aliens whose proceedings were initiated after that date.

B. PENDING APPLICATIONS

However, this finding that section 440(d) of the AEDPA was effective immediately and not limited in application to those aliens brought into proceedings after April 24, 1996, does not finally resolve whether this respondent is barred from section 212(c) relief. There remains a subcategory of aliens, including the respondent, who already had applications for section 212(c) relief pending on April 24, 1996. Such aliens include those deportable aliens awaiting their section 212(c) merits hearings, as well as those aliens who have appealed the Immigration Judge's denial of their applications, and those who, having received a grant of

section 212(c) relief, are subject to a Service appeal of the Immigration Judge's decision. In determining congressional intent from the language and design of the AEDPA as a whole, we do not find that Congress' silence regarding the effective date of section 440(d) reflects an intent for the amendment to bar pending applications for section 212(c) waivers. In reaching this conclusion, we note that in section 413 of the AEDPA, which bars alien terrorists from most forms of relief from deportation, Congress expressly indicated that those bars to relief "shall take effect on the date of enactment of the AEDPA and shall apply to applications filed before, on, or after such date if final action has not been taken on them before such date." *See* section 413(g) of the AEDPA, 110 Stat. at 1269-70.

Another basic rule of statutory construction instructs that no provision of law should be so construed as to render a word or clause surplusage. See *Kungys v. United States*, 485 U.S. 759 (1988); *Colautti v. Franklin*, 439 U.S. 379 (1979). By adding the effective date found at section 413(g) of the AEDPA, Congress expressed its clear intent that section 413 of the AEDPA apply specifically to pending applications of alien terrorists. To construe this same intent by Congress' silence in section 440(d) of the AEDPA would require us to conclude that the "before, on, or after" language of section 413(g) of the AEDPA is unnecessary and irrelevant to whether that section applies to applications for asylum pending before the AEDPA's enactment. This we decline to conclude. Rather, we interpret Congress' omission of the "before, on, or after" language in section 440(d) to indicate its intent that aliens with applications pending on April 24, 1996, should not be statutorily

barred from section 212(c) relief by operation of the AEDPA.[3]

This conclusion is consistent with the approach to statutory interpretation set forth by the United States Supreme Court in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994). In that case, the Supreme Court observed that when deciding whether changes in law should be applied to pending controversies in the absence of express congressional directive, "settled expectations should not be lightly disrupted." *Landgraf v. USI Film Products, supra*, at 1497. By applying section 440(d) of the AEDPA to only those applications for section 212(c) relief filed on or after the date of the enactment of the AEDPA, the unique expectations of aliens whose applications for section 212(c) relief were pending prior to the enactment of the AEDPA are not disrupted. Such aliens demonstrated, with the filing of their pre-AEDPA applications, their expectation that although they were deportable under various provis-

---

[3] Similarly, we note that silence cannot reasonably be interpreted as evidencing a congressional intent to apply the new limitations in section 212(c) only to those aliens whose *convictions* for the relevant offenses occurred on or after the date of enactment of the AEDPA because Congress expressly stated that result in the AEDPA when such was its intent. *See* section 440(f) of the AEDPA, 110 Stat. at 1278 (stating that the amendments to the aggravated felony definition "apply to convictions entered on or after the date of enactment"). Moreover, as regards the issue of "settled expectations" discussed below, both the Board and the courts have noted that aliens cannot reasonably argue "'that they somehow relied on the availability of a discretionary waiver of deportation when choosing to engage in [criminal] activity.'" *Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 964 (BIA 1995) (quoting *DeOsorio v. United States INS*, 10 F.3d 1034, 1042 (4th Cir. 1993)).

ions of the Act, they would be able to present evidence of favorable social and humane considerations that might countervail evidence of their undesirability as lawful permanent residents. *See generally Matter of Marin*, 16 I&N Dec. 581 (BIA 1978). The interpretative approach enunciated by the Supreme Court in *Landgraf* supports the conclusion that Congress did not intend by its silence to disrupt the expectations of those aliens whose applications for section 212(c) relief were pending on April 24, 1996.

Moreover, this conclusion is consistent with the approach adopted by Congress with its amendment of section 212(c) of the Act by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, in which a statutory 5-year aggravated felony bar to that relief was made applicable to aliens who applied after the date of the enactment of that 1990 amendment. *See Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 963 (BIA 1995).

C. APPLICABILITY TO RESPONDENT'S SECTION 212(C) REQUEST

The respondent applied for section 212(c) relief on April 28, 1995, prior to the April 24, 1996, enactment of the AEDPA. Accordingly, the bar to section 212(c) relief added by the amendment of that section by section 440(d) of the AEDPA does not apply to the respondent's application for relief. There is no question that the respondent is eligible for section 212(c) relief by the version of that section that was in effect prior to its amendment by section 440(d) of the AEDPA. That is, the respondent is not an alien convicted of an aggravated felony who served for such felony a term of imprisonment of at least 5 years. Thus, we find the

respondent eligible for relief under section 212(c) of the Act, and we proceed to the question of whether he merits that relief in the exercise of discretion.

III. DISCRETION

Notwithstanding the respondent's continued eligibility for a waiver of inadmissibility, we ultimately disagree with his appellate argument that the Immigration Judge erred in finding that he did not warrant a discretionary waiver pursuant to section 212(c) of the Act. As the Immigration Judge correctly noted, the respondent's attempted criminal sale of cocaine, in addition to his three other drug-related felonies, require a demonstration of outstanding or unusual equities before the respondent may receive a section 212(c) waiver of inadmissibility. *See Matter of Marin, supra*; *cf. Matter of Burbano*, 20 I&N Dec. 872, 879 (BIA 1994). We agree with the Immigration Judge that the respondent has failed to demonstrate such equities so that he may overcome his serious and recent drug trafficking crimes.

The respondent testified at the hearing that he has various family ties in the United States, including his mother, two siblings, and his United States citizen son. Moreover, the respondent explained that his son lives with his ex-wife, and that his family assists them financially. The respondent's mother and sister also testified on his behalf, and while we find it noteworthy that the respondent's family members attended the hearing, we do not find that this familial support alone rises to the level of outstanding or unusual. The respondent maintains various family ties in the Dominican Republic, including three daughters and four siblings. He arrived

in the United States only 10 years ago as a 25-year-old adult, and his employment during his residence in the United States has been sporadic.

Regarding his rehabilitative efforts, we note that the respondent testified that he has participated in a drug rehabilitation program while he has been incarcerated, and that after 18 years of drug use, he has maintained a drug-free lifestyle while in prison. Moreover, he testified that he has also received his GED while incarcerated, and he has recently strengthened his religious beliefs. We agree with the Immigration Judge that the respondent has demonstrated a willingness to continue his progress towards a drug-free and crime-free lifestyle and has taken steps towards rehabilitation. *See Matter of Arreguin*, Interim Decision 3247 (BIA 1995). However, considering these factors in conjunction with his family ties here and abroad, and his relatively short period of residence in the United States, we can not find that the respondent has demonstrated sufficient equities to overcome his four recent drug trafficking felonies. *Cf. Matter of Burbano, supra.* Accordingly, we will dismiss the respondent's appeal.

ORDER: The appeal is dismissed.

CONCURRING AND DISSENTING OPINION: Lory D. Rosenberg, Board Member

I respectfully concur in part and dissent in part.

Our decision today seeks to resolve the ambiguity presented by section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1277 (enacted Apr. 24, 1996) ("AEDPA"), which amends the category of otherwise eligible lawful permanent resident aliens precluded from a waiver under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c)(1994).

The text of this section, as set forth by the majority, contains no express provision specifying an effective date for this amendment. The majority opinion properly recognizes that the fact that the AEDPA became law on April 24, 1996, is not dispositive of the effect of section 440(d) on an alien who "is deportable" on the grounds of deportability designated in that section.[1]

In essence, we hold that two related factors, traditional principles of statutory construction and Supreme

---

[1] This "ill-advised" provision of AEDPA is less than artfully drawn, having been enacted at the 11th hour as part of a bill ostensibly addressing the deportation of terrorists, not the deportation of "long-term legal residents." *See* President's Remarks on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 Weekly Comp. Pres. Doc. 717 (Apr. 29, 1996). While section 440(d) refers to those "deportable by reason of having committed any criminal offense covered" by specified sections of the Immigration and Nationality Act, the only aliens so deportable are aliens who actually have been convicted of such offenses.

Court law interpreting the application of new statutes to pre-existing circumstances, must control the reach of this provision of the AEDPA. *See Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994). In the context of the appeal before us, it is necessary only to find, as the majority does, that the amendment does not apply to pending applications already filed by aliens in deportation proceedings. Thus, the respondent, who is deportable by reason of a conviction for a covered offense, remains eligible to have his pending application for a waiver of deportability under section 212(c) determined. For purposes of the scenario presented in this appeal, I concur.

I. THE SILENCE OF THE STATUTE

The silence of the statute with regard to its impact upon conduct and other events which already have taken place is significant. Nothing in the text or the legislative history of the AEDPA indicates that section 440(d) should be applied retroactively to pending cases or pre-amendment circumstances, or that this silence was due to an "accident of draftsmanship." *INS v. Phinpathya*, 464 U.S. 183, 191 (1984). By contrast, as the majority discusses, other sections of the AEDPA expressly address the effect of the particular provision on circumstances existing prior to its enactment. *See, e.g.*, section 413(g) of the AEDPA, 110 Stat. at 1269-70.

As recognized consistently by the Supreme Court, retroactivity is not favored in the law. *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988). A presumption against retroactivity generally is consistent with legislative and public expectations as a safeguard against unfairness. *Landgraf v. USI Film*

Products, supra, at 1501. This principle dates back to English common law, and even to Roman law. *See, e.g., United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806); *Dash v. Van Kleeck*, 7 Johns. 477, 502-03, 505 (N.Y. 1811) (the prince may enact a retrospective law as long as it is done expressly).[2]

In *Landgraf v. USI Film Products, supra*, the Supreme Court restated the principle that a statute shall not be given retroactive effect unless expressly provided by Congress. Specifically, the Supreme Court cautioned that "[a] statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct which occurred prior to that date." *Id.* at 1493.

To the extent that the majority decision is understood to mean either that the language in the statute as a whole is reconciled or that the *Landgraf* principles, discussed below, are properly observed only by finding that aliens who have *filed applications* for section 212(c) waivers by April 24, 1996, are not subject to section 440(d), I must differ. I write separately because I believe this Board's decision requires clarification on these points.

---

[2] *See Demelo v. Cobb*, No. 96-10903-REK (D. Mass. June 19, 1996) (discussing the specific language in the AEDPA relating to restrictions upon release from custody, and concluding that any interpretation of the Act applying it to offenses committed before April 24, 1996, (and convictions obtained before that date) would raise serious constitutional issues).

II. STATUTORY CONSTRUCTION AND RETROACTIVIT

As the agency implementing the statute, we recognize that a statutory construct involving silence in one provision but not another requires us to give effect to each provision. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (holding that the Board may not blur the distinctions between two related but separate statutory standards or reduce them into one); *Matter of Hou*, 20 I&N Dec. 513 (BIA 1992) (recognizing that Congress' use of different terminology in two sections of the statute requires the Board to give each independent effect).

In fact, this is precisely what was done by this Board in *Matter of A-A-*, 20 I&N Dec. 506 (BIA 1992), where we looked to the statutory language in various sections of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, in order to determine the applicability of the amendment of section 212(c) contained in that enactment. Although the section was silent as to its applicability to prior convictions, the express language of the statute made that amendment applicable to pending applications.[3]

---

[3] I note that our decision in *Matter of A-A-*, *supra*, also involved a situation, not present here, in which a retroactive application was necessary in order for the law to be effective. *See also Matter of Gomez-Giraldo*, 20 I&N Dec. 957 (BIA 1995) (finding 5-year incarceration bar would be delayed for 5 years if not applied to prior convictions).

Coupled with the principle enunciated by the Supreme Court in *Landgraf v. USI Film Products*, *supra*, at 1497, that when new provisions attach new legal consequences to prior events, "settled expectations should not be lightly disrupted" (unless Congress expressly states such an intent), these precepts militate in favor of adjudicating the respondent's waiver application according to the prior law. For the sake of brevity, I will refer to these two considerations—the requirement that we must interpret silence in a provision so as to give effect to the whole statute, and the doctrine of settled expectations as foreclosing the retroactive application of a new or amended statute to prior conduct—as the "*Landgraf* principles."

Semantic sparring over whether a new provision can be retroactive because it is being applied to an adjudication we are conducting in the present is not a useful exercise. Nonetheless, the dissent focuses on the application, which is a continuing one, rather than on past events and expectations which are settled, and avoids addressing the issue. The issue is whether the new provision *operates* retroactively. That is, does it affect the settled expectations of the parties, in this case, the respondent, as best described in the *Landgraf* principles.[4] Moreover, this Board previously has acknowledged that eliminating section 212(c) relief *does* have

---

[4] The predisposition against a retroactive construction of laws which operate to affect prior conduct is the principle that an individual should be able to act with reasonable certainty of the legal consequences. *See Chew Heong v. United States*, 112 U.S. 536, 559 (1884); *see also* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960).

retroactive effect. *Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 963 (BIA 1995); *Matter of A-A-*, *supra*.

In this instance, even though the determination of eligibility for a waiver under section 212(c) may be prospective, the restriction in the amended provision has a retroactive operation or effect as it constitutes a new legal consequence which attaches, at a minimum, to any lawful permanent resident already subject to an Order To Show Cause or otherwise in the agency "pipeline." It is arguable that the legal consequences attach, in fact, to the conviction itself and even to the commission of the offense. Thus, as I discuss below, I believe that to find the amended provision applicable to all applications, as does the dissent, or only to already-filed and pending applications, as does the majority, falls short of the proper observance of the *Landgraf* principles.

A. *Landgraf* Principles and Board Precedent

Previously, the Board held that where new statutory provisions affecting eligibility for relief from deportation come into effect during the pendency of a deportation hearing or an administrative appeal to this Board, and there exists no statutory directive to the contrary, the new statutory provisions shall be applied to the application for relief before us, and the application may be denied on the basis of the statutory amendment. *Cf. Matter of U-M-*, 20 I&N Dec. 327 (BIA 1991), *aff'd*, 989 F.2d 1085 (9th Cir. 1993). Although the dissent clings to this position, it simply is not applicable here.

Since our decision in *Matter of U-M-*, *supra*, the United States Supreme Court issued its decision in

Landgraf v. USI Film Products, supra, in which it comprehensively discussed the issue of the application of statutory amendments to pending controversies. As I understand the dissent to assert that a silent statute is not only effective when signed by the President, but applies to all prior or pending events or conduct, I note that in *Landgraf,* the Supreme Court reconciled the apparent conflict between the presumption that "a court must apply the law in effect at the time it renders its decision," and the presumption against retroactivity. *Landgraf v. USI Film Products, supra,* at 1486-87 (citing *Bradley v. Richmond School Board,* 416 U.S. 696, 711 (1974)).

In fact, in *Matter of Gomez-Giraldo, supra,* in which we last visited the impact of the Supreme Court's reasoning in *Landgraf v. USI Film Products, supra,* we held that the aggravated felony bar added to section 212(c) of the Act by a previous amendment implicated none of the concerns enunciated in *Landgraf.* We reasoned that, because that amendment, by its express terms, applied only to those applications for relief made on or after the effective date of the amendment, it would not disturb a lawful permanent resident's settled expectations that he or she could apply for and be granted a waiver under section 212(c). *Matter of Gomez-Giraldo, supra,* at 963-64. Our holding today, relating to an amendment with no express language, is entirely consistent with that decision and the reasoning underlying it.

B. *Landgraf* Principles and Factual Scenarios Under Section 440(d)

In *Landgraf v. USI Film Products*, *supra*, the Supreme Court set out a basic test to determine whether a statute would operate "retroactively" or "retrospectively" if applied to a case pending at the time of the statute's enactment. The Court stated that the question a body must ask is "whether the provision attaches new legal consequences to events completed before its enactment." *Id.* at 1499.

The first question presented is, which cases, if any, in the agency "pipeline" are affected? The majority limits its determination to persons who have already filed applications for relief under section 212(c). There remains an open question, however, whether the amendment applies to all potential candidates for the waiver already "in the pipeline."

Arguably, the "pipeline" could include various categories of individuals who are alleged to be deportable under the pertinent sections of the statute, and who are otherwise eligible for and require the grant of a waiver under section 212(c) in order not to be deported. Assuming the main, more comprehensive group to be putative candidates who have been identified by the Immigration and Naturalization Service as deportable aliens is consistent with the *Landgraf* principles.

This could encompass aliens who are the subject of a "detainer" placed against them during their incarceration for a criminal offense as the result of a request by the Service; it could include those served with an Order to Show Cause issued by the Service; and it could

include those subject to an Order to Show Cause against whom deportation proceedings have commenced as defined under the regulations. It could include those who have filed an application for a waiver under section 212(c) in proceedings before an Immigration Judge; those who are seeking to reopen to apply for 212(c) relief; and those who have received an order from an Immigration Judge from which an appeal has been taken to the Board and/or to the circuit courts of appeal.

In particular, this Board only recently recognized decisions of the United States Courts of Appeals for the Second, Seventh, and Ninth Circuits, which hold that the statutory language of section 212(c) makes plain that an alien may establish lawful domicile while in a status other than that of a permanent resident. *See Matter of Cazares*, Interim Decision 3262 (BIA 1996) (holding that a temporary resident under section 245A of the Act may accrue time towards 7-year lawful domicile requirement of section 212(c)). Further, the Fifth Circuit held specifically that temporary residents under both the legalization (section 245A) and special agricultural worker ("SAW") (section 210) provisions may accrue lawful domicile while in that status. *See White v. INS*, 75 F.3d 213 (5th Cir. 1996).

This Board has remanded appeals from decisions arising in those circuits to allow applications for section 212(c) to be filed and heard in the first instance or for a hearing on the merits when such was pretermitted by the Immigration Judge. The majority overlooks these cases; while not explicitly implicated in our decision today, the truncated interpretation of the majority leaves unresolved hundreds of cases of individuals who

we found to have been entitled to consideration at least under controlling circuit law, but whose applications were unlawfully pretermitted and foreclosed. In my view, such applicants are entitled to the opportunity to seek relief from deportation under section 212(c) whether or not they have a pending application on file. *See Snajder v. INS*, 29 F.3d 1203 (7th Cir. 1994).

The next question is whether the amendment applies to aliens convicted of any offense which would render them subject to deportation proceedings on charges referenced in section 212(c), as amended, and ineligible to apply for or be granted a waiver under that section. In the first published opinion on a provision of the AEDPA, the District Court of Massachusetts, construing section 440(c), posited that it was untenable that Congress could have intended that the terms of the provision apply other than to persons convicted on or after the April 24, 1996 effective date. *Demelo v. Cobb*, No. 96-10903-REK (D. Mass. June 19, 1996). Section 440(c) refers to custody requirements applicable to the exact same categories of aliens affected by the operation of section 440(d).

One difference between the language in section 440(c) and that in section 440(d) is that the plain language of section 440(c) amends section 242(a)(2) of the Act, which mandates the Attorney General to take into custody any alien "*convicted of* [the same offenses specified in amended section 212(c)] . . . upon release of the alien from incarceration." (Emphasis added.) By contrast, the language of section 440(d) amends section 212(c) to read that the provision "shall not apply to an alien who *is deportable* by reason of having committed an offense." (Emphasis added.)

As the majority states, silence cannot reasonably be interpreted as supporting a "settled expectation" of being able to engage in criminal activity without consequences. However, I part ways with the majority when they declare that individuals may not have "settled expectations" with regard to an opportunity to seek a section 212(c) waiver that affects a plea of guilty or other trial or appellate choices.

III. LANDGRAF PRINCIPLES AND MANIFEST INJUSTICE

In the absence of specific language, the reach of the statute depends upon settled expectations. This doctrine is different from, but enhanced by, that of "manifest injustice."

The human consequences of the AEDPA which are implicated by the legal question before us are compelling. I believe this is especially important to note in light of the fact that our decision today denies the requested relief from deportation. Waivers under section 212(c) are not easily obtained; to the contrary, they are perhaps the most difficult and hard won of any forms of discretionary relief over which we exercise our jurisdiction. At stake is an alien's ability to remain in this country as a permanent resident, which is determined by balancing the good of society as a whole against the individual social and humane considerations that may pertain to any one case. *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).

Such waiver applications are individual and fact bound, and they are properly left to the exercise of discretion by Immigration Judges in individual cases,

subject to the de novo review authority of this Board. While applicants for section 212(c) waivers share the adverse factor of having been convicted of a criminal or other immigration offense or offenses which renders them subject to deportation, they are as individual as humans can be and as human experience allows.

Applicants for waivers under section 212(c), until now, have included persons convicted of a single, possibly victimless or nonviolent crime or crimes over a discrete period of their stay in the United States, who have acknowledged their wrongdoing and changed their behavior. They include individuals who came to this country with their families as infants; adults who have neither spoken their native language nor been in their native country since childhood; fathers, mothers, and single parents of United States citizen children; businessmen and women who employ United States citizen workers in legitimate occupations; caretakers of elderly United States citizen parents; victims of domestic violence; and refugees. While they are not free of responsibility for their mistakes, they have paid, often dearly, for their transgressions in the criminal justice system, and they cannot all be said to unilaterally present a menace or threat to our society such that deportation is warranted.

I find compelling policy and practical reasons to go beyond such a limited interpretation as the one the majority proposes in this case. All of these people, and no doubt many others, had settled expectations to which they conformed their conduct. *Landgraf v. USA Film Products, supra,* at 1497, instructs that those "settled expectations should not be lightly disrupted." "Retroactive application of laws is undesirable where

advance notice of the change in the law would motivate a change in an individual's behavior or conduct." *Griffon v. United States Dept. of Health and Human Services*, 802 F.2d 146, 153 (5th Cir. 1986) (citing *Alexander v. Robinson*, 756 F.2d 1153 (5th Cir. 1985)).

Statutes may not be applied retroactively where doing so would result in manifest injustice to those affected. *Bradley v. Richmond School Board*, 416 U.S. 696 (1974). Here, manifest injustice would result to a significant number of legal residents, because, while otherwise eligible, their right to apply for a section 212(c) waiver will have been infringed. Moreover, I note the inevitable disparity in treatment accorded different individuals that would result, because otherwise eligible legal residents requiring a waiver have no control over when proceedings are commenced or how quickly or in what order hearings and appeals are set or adjudicated. *See Dion v. Secretary of Health and Human Services*, 823 F.2d 669, 672 (1st Cir. 1987) (finding a retroactive application inappropriate where a disparity among applicants would result).

Further, although no legal resident has the absolute right to be granted section 212(c) relief, eligible residents do have a vested right to apply and be considered for such relief. *See, e.g., Rabiu v. INS*, 41 F.3d 879 (2d Cir. 1994); *Snajder v. INS*, *supra*, at 1207-08; *Batanic v. INS*, 12 F.3d 662, 667 (7th Cir. 1993). For example, a respondent's counsel might have been ineffective in failing to file a section 212(c) application on behalf of an otherwise eligible respondent. *Rabiu v. INS*, *supra*. The Service may have violated a regulation denying the respondent the right to counsel. *Snajder v. INS*, *supra*; *Batanic v. INS*, *supra*. The

Immigration Judge might have wrongfully denied the respondent's motion for a change in venue that prejudiced his or her rights to a fair hearing. *Campos v. Nail*, 43 F.3d 1285 (9th Cir. 1994). The Immigration Judge might have failed to notify the respondent of relief for which he or she was apparently eligible. *Bui v. INS*, 76 F.3d 268 (9th Cir. 1996).

In any of these cases, I believe due process and fundamental fairness would dictate that we accept the case for consideration of section 212(c) relief, nunc pro tunc. Even while acknowledging the absence of statutory authority to do so, this Board has long granted nunc pro tunc relief to cure various defects in proceedings, if such treatment would dispose of a case. *Matter of Garcia*, Interim Decision 3268 (BIA 1996); *see also Matter of Lok*, 18 I&N Dec. 101, 107 (BIA 1981), *aff'd*, 681 F.2d 107 (2d Cir. 1982).

IV. CONCLUSION

I would find that section 440(d) of the AEDPA operates retroactively if applied not only to pending section 212(c) applications, but to other prior events. It would attach a new legal consequence to both a pre-amendment charge or finding of deportability under most of the provisions found at section 241(a)(2) of the Act. Prior to the amendment, a person entering into plea agreements or found deportable under those sections who were otherwise eligible could rely upon an opportunity to present evidence of social and humane considerations to countervail evidence of their undesirability as a permanent resident in order to demonstrate that the granting of section 212(c) relief appeared to be in the best interest of the United States. *Matter of*

Marin, supra, at 584. To upset those settled expectations by retroactively applying section 440(d) of the AEDPA, without the express directive of Congress requiring such an application, attaches a new legal consequence to conduct and events already completed by April 24, 1996. It would require us to disregard the concerns articulated by the Supreme Court in *Landgraf v. USI Film Products*, *supra*, and, in my view, would contravene both practical considerations and fundamental fairness.

DISSENTING OPINION:

Fred W. Vacca, Board Member, in which Mary Maguire Dunne, Vice Chairman, Gerald S. Hurwitz, Lauri S. Filppu, and Patricia A. Cole, Board Members, joined.

I respectfully dissent.

As stated by the majority, the issue before us is to determine the effective date of section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1277 (enacted Apr. 24, 1996) ("AEDPA"), and if effective on enactment, to decide which aliens who were eligible for relief under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994), are affected by the amendment. I agree with the majority's finding that general principles of statutory construction lead directly to the conclusion that the amendment took effect on the date of enactment, absent the inclusion of an alternative effective date. Therefore section 440(d) of the AEDPA applies immediately to aliens in proceedings. *See Matter of U-M-*, 20 I&N Dec. 327, 332 (BIA 1991), *aff'd*, 989 F.2d 1085 (9th Cir. 1993).

However, I part company with the remainder of the analysis employed by the majority with respect to the applicability of section 440(d) to pending applications for section 212(c) relief. I do not view the fact that Congress specifically barred pending applications for relief by alien terrorists, as set forth in section 413(g) of the AEDPA, 110 Stat. at 1269-70, to in any way dictate or even guide us in determining whether section 440(d) applies to pending section 212(c) applications. For com-

parison purposes, I cannot determine the relevant effective date from looking at the four corners of the statute to the extent that Congress employed a wide variety of effective dates throughout the AEDPA, including prospective dates. I conclude that we are compelled to apply the provisions of section 440(d) to all pending section 212(c) applications.

This Board has consistently held that an application for relief from deportation is an ongoing application. *Matter of U-M-*, *supra*, at 332. The law that applies to the application is the law that exists at the time the final administrative decision is made. *Ziffrin v. United States*, 318 U.S. 73 (1943); *Matter of U-M-*, *supra*. A final administrative decision is made when the Board renders its decision in a case on appeal or certification, or where no appeal is taken, the right to appeal is waived, or the time allotted for appeal has expired. *See Matter of Lok*, 18 I&N Dec. 101 (BIA 1981), *aff'd*, 681 F.2d 107 (2d Cir.1982); 8 C.F.R. §§ 3.1(d)(2), 3.39 (1995).

This Board has also held that an application for section 212(c) relief filed in the context of deportation proceedings is equivalent to one made at the time an alien physically seeks admission into the United States. *Matter of A-A-*, 20 I&N Dec. 492, 502 n.22 (BIA 1992). Thus, in addition to qualifying as a person whose ongoing application for relief is subject to the existing law while under administrative review, the section 212(c) applicant also stands as an individual seeking entry to the United States, and his admissibility is determined on the basis of the facts and the law that exist at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992).

Furthermore, like the majority, I find additional support for my position in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994). In *Landgraf* the Supreme Court stated:

> Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.

Id. at 1501.

Prospective relief has been defined by the Supreme Court as relief that operates in futuro, such as injunctive relief. *See American Steel Foundaries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921). This is in contrast to relief that operates "retroactively," such as damages and restitution. *See Hutto v. Finney*, 437 U.S. 678, 695 n. 24 (1978).

The Supreme Court has specifically held that statutory provisions that alter or affect forms of prospective relief are to be given effect upon the effective date of the legislation and should be applied to pending suits. *American Steel Foundries v. Tri-City Central Trades Council, supra*, at 201; *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 464 (1921); *see also Hall v. Beals*, 396 U.S. 45 (1969). The Court has further held that parties to an action do not have vested rights to prior judgments conferring forms of prospective relief while their cases remain subject to appellate review. *See American Steel Foundries v. Tri-City Central Trades Council, supra*; *Duplex Co. v. Deering, supra*; *see also Raferty V. Smith Bell & Co.*, 257 U.S. 226 (1921).

Therefore, the ultimate right to prospective relief must be determined at the time of final administrative or judicial review.

Like injunctive relief, relief from deportation under section 212(c) of the Act is prospective in nature. *See Matter of K-L-*, 20 I&N Dec. 654, 658 (BIA 1993), *aff'd*, *Lee v. INS*, 12 F.3d 1102 (8th Cir. 1993) (referring to section 212(c) relief as prospective). Under the Immigration and Nationality Act, an alien's right to benefit from a waiver under section 212(c) can only be determined at the time of a hearing and upon a finding of excludability or deportability. Relief under section 212(c) therefore operates in futuro and does not nullify the fact that the alien, prior to applying for the waiver, was either excludable or deportable. Convictions alleged to be grounds for excludability or deportability do not disappear from an alien's record for immigration purposes upon a grant of relief under section 212(c). *Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991). Hence, section 440(d) of the AEDPA amends a prospective form of relief and accordingly should be applied to all cases before this Board that remain subject to our appellate review. *See Landgraf v. USI Film Products*, *supra*; *American Steel Foundaries v. Tri-City Central Trades Council*, *supra*.

In light of the above case law, I am hard pressed to identify a basis for not applying section 440(d) of the AEDPA to all section 212(c) applications that are pending adjudication or review. The weight of authority clearly requires the Board to apply the new law, as the law was changed before a final administrative decision had been rendered. Furthermore, applying the amended section 212(c) provisions to pending appli-

cations does not offend any of the concerns underlying the retroactive operation of new statutes. *Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 963 (BIA 1995).

Due to the nature of an application for a waiver under section 212(c), which is a continuous application until the conclusion of final administrative action, the effect of applying section 440(d) to pending applications is not retroactive. The only expectation an alien seeking to apply for section 212(c) waiver can rely on is that his application will be considered according to the law and facts as they stand at the time of final administrative review. In this context, it has long been true that an alien whose circumstances improve through the acquisition of an additional equity can move the Board to remand a pending matter for reconsideration of the discretionary aspect of his section 212(c) application in light of the new evidence. *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992).

Finally, I am concerned with the majority's preferred choice of the date of filing the section 212(c) application as being determinative of which applications can be evaluated under the pre-AEDPA statutory provisions. This effective date is not contained elsewhere in the AEDPA. Moreover, there are numerous other dates that could be selected, e.g., the date the crime giving rise to the ground of deportability occurred, the date of issuance of the Order to Show Cause, the date on which a finding of deportability was rendered, and the date of filing the application.

The majority claims support for its selected effective date in the Supreme Court's analysis in *Landgraf v. USI Film Products, supra.* However, under *Landgraf*,

we consider whether the new statute "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed" in determining whether a statute would have retroactive effect. *Id.* at 1505. These concerns of retroactivity, as enunciated in *Landgraf*, apply to the relevant past act. For section 440(d) purposes, this act occurs when the alien committed the crime that underlies the charge of deportability.

The majority appears to neglect this aspect of the retroactivity issue in its determination that applications filed by the date of enactment of the AEDPA are to be adjudicated under the former section 212(c) provisions so as not to unfairly disrupt the "unique expectations" of aliens at the time of filing. In my opinion, the expectations that an alien has at the time of filing an application under section 212(c) of the Act are largely irrelevant in determining whether section 440(d) of the AEDPA operates retroactively. Section 440(d) does not alter the rights an alien had at the time he committed the crime. Upon the commission of a criminal act that triggers deportability, an alien now stands, as he would have stood before, facing the prospect of criminal liability, as well as deportation from the United States. *See Scheidemann v. INS*, 83 F.3d 1517 (3d Cir. 1996).

In the face of congressional silence as to the effective date of section 440(d), the judicial default rules direct us to apply the law as of the date of enactment absent retroactive effect, which is not implicated here. The majority offers no persuasive analysis to support its

conclusion that the traditional default rules do not govern here. Accordingly, I dissent.

APPENDIX I

[logo omitted]

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C. 20530

IN RE: MATTER OF BARTOLOME JHONNY SORIANO

IN DEPORTATION PROCEEDINGS

ORDER NO.

Pursuant to 8 C.F.R. § 3.1(h)(iii), the Commissioner of the Immigration and Naturalization Service has referred to me for review the decision of the Board of Immigration Appeals (BIA) in Matter of Bartolome Jhonny Soriano (A39 186 067) (July 18, 1996). I hereby grant the Commissioner's request for review and vacate the opinion of the BIA pending my further determination.

September 12, 1996
Date

/s/ JANET RENO
JANET RENO
Attorney General

APPENDIX J

[seal omitted]

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C. 20530

Matter of Soriano, BIA. Int. Dec. No. 3289 (1996)

IN DEPORTATION PROCEEDINGS

At the request of the Commissioner of Immigration and Naturalization, the Board of Immigration Appeals ("BIA") referred its decision in this matter pursuant to 8 C.F.R. § 3.1(h)(iii). Respondent Soriano, a native and citizen of the Dominican Republic, was admitted to the United States in 1985 as a lawful permanent resident alien. In 1992, he was convicted under New York law of the offense of an attempted sale of a controlled substance. Based on that conviction, the Immigration and Naturalization Service ("INS") instituted deportation proceedings against him in 1994.

In 1995, Respondent sought the relief of waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c). Section 212(c) grants the Attorney General discretionary authority to admit otherwise excludable permanent resident aliens. Although the statute expressly authorizes only a waiver of exclusion, courts have interpreted it to authorize relief in deportation proceedings as well. *See Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976); *De Osorio v. INS*, 10 F.3d 1034, 1039 (4th Cir. 1993). The

Immigration Judge found that the respondent was eligible for that relief, but, in the exercise of discretion, denied his application. *See Matter of Soriano*, File No. A39 186 067 (Executive Office for Immigration Review ("EOIR"), Office of the Immigration Judge, Oct. 12, 1995). Respondent appealed from that decision on October 23, 1995.

On April 24, 1996, while Respondent's appeal was pending, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). Section 440(d) of AEDPA amended INA § 212(c). The amendment provides in relevant part that section 212(c) relief shall not be available to aliens who are deportable by reason of having committed certain specified criminal offenses. Respondent's offense is among those specified.[1] Thus, a threshold issue on appeal was whether the amendment to section 212(c) applied to foreclose Respondent's application for relief from deportation.[2]

---

[1] The amendment provides in relevant part that section 212(c) relief shall not be available to an alien who "is deportable by reason of having committed any criminal offense covered in (INA) section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)." 110 Stat. at 1277, as amended by Section 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C., Department of Defense Appropriations Act, 1997, Pub. L. No. 104-208, 1996 U.S.C.C.A.N. Vol. 9B (110 Stat.) 1672. Respondent's offense is covered by sections 241(a)(2)(A)(iii) and (B) of the INA. *See* 8 U.S.C. § 1251.

[2] It is important to note as a threshold matter that deportation proceedings are civil actions, and, thus, the constitutional bars to retroactive application of penal legislation do not apply. *INS v.*

The BIA was unanimous in concluding that AEDPA § 440(d) was effective immediately upon enactment on April 24, 1996. The BIA was divided, however, as to whether AEDPA § 440(d) applied to applications for section 212(c) relief that were pending on the effective date of AEDPA. Six members of the BIA concluded that Congress did not intend that aliens who had applications pending on April 24, 1996, should be barred from seeking that relief. Accordingly, they found that Respondent continued to be eligible for waiver of inadmissibility.[3] Five members of the BIA dissented. They would have held that section 440(d) did apply to pending applications for section 212(c) relief. One member of the BIA concurred in part and dissented in part. That member agreed with the majority that AEDPA § 440(d) should not be applied to pending section 212(c) applications, but would also have declined to apply it to other cases, such as those of permanent resident aliens subject to an Order to Show Cause.

For the reasons stated below, I conclude that the amendment to INA § 212(c) made by AEDPA § 440(d)

Lopez-Mendoza, 468 U.S. 1032, 1038 (1984); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594-95 (1952). Moreover, it is well settled that Congress may legislate to alter the immigration consequences of past criminal convictions or acts. *Lehman v. Carson*, 353 U.S. 685, 690 (1957); *Mulcahey v. Catalanotte*, 353 U.S. 692, 694 (1957).

[3] The majority agreed with the Immigration Judge's conclusions that Respondent's attempted criminal sale of cocaine, together with his three other drug-related felonies, required a demonstration of outstanding equities before he could receive a waiver of inadmissibility, and that Respondent had not made such a demonstration.

applies to proceedings such as Respondent's, in which an application for relief under section 212(c) was pending when AEDPA was signed into law.[4]

Analysis

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court sought to "reconcile two seemingly contradictory statements found in [the Court's] decisions concerning the effect of intervening changes in the law": that "'a court is to apply the law in effect at the time it renders its decision,'" and that "'[r]etroactivity is not favored in the law.'" *Id.* at 263-64 (citations omitted).

The Court set forth the method for analyzing the temporal reach of a statute:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not

---

[4] By Order dated September 12, 1996, I granted the request for review and vacated the opinion of the BIA in Matter of Bartolome Jhonny Soriano (A39 186 067).

> govern absent clear congressional intent favoring such a result.

Id. at 280.

In the present case, nothing in the language of the newly enacted statute, AEDPA § 440(d), specifies either that it is to be applied in pending deportation proceedings, or that it is not to be. Thus, the next task is to determine whether the statute would be given retroactive effect if applied in pending deportation proceedings. In this regard, the Court observed that "[w]hile statutory retroactivity has long been disfavored, deciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Id.* at 268. A statute does not operate retroactively "merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 269-70 (citation and footnote omitted).

Of particular relevance here, the Court suggested that changes in the law affecting prospective relief, as well as those affecting jurisdiction and procedure, are generally not to be considered "retroactive." Specifically, the Court said:

> Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive. Thus, in *American Steel Foundries v. Tri-City Central Trades Coun-*

> *cil*, 257 U.S. 184 (1921), we held that § 20 of the Clayton Act, enacted while the case was pending on appeal, governed the propriety of injunctive relief against labor picketing. In remanding the suit for application of the intervening statute, we observed that "relief by injunction operates *in futuro*," and that the plaintiff had no "vested right" in the decree entered by the trial court.

Id. at 273-74.

Similarly, the three separately concurring Justices (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in the judgment), emphasized that intervening law was typically applied to pending applications for prospective relief:

> Courts traditionally withhold requested injunctions that are not authorized by then-current law, even if they were authorized at the time suit commenced and at the time the primary conduct sought to be enjoined was first engaged in. The reason, which has nothing to do with whether it is possible to have a vested right to prospective relief, is that "[o]bviously, this form of relief operated only *in futuro*." Since the purpose of prospective relief is to affect the future rather than to remedy the past, the relevant time for judging its retroactivity is the very moment at which it is ordered.

Id. at 293 (citations omitted).

Both the majority and concurring Justices identified another set of intervening statutes—those that confer or eliminate jurisdiction—that do not operate retroactively merely because they are applied to conduct arising before the statute's enactment. Justice Scalia

explained the Court's "consistent practice of giving immediate effect to statutes that alter a court's jurisdiction . . . by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power—so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised." *Landgraf*, 511 U.S. 286, 292-93 (Scalia, J. concurring).[5]

In summary, under *Landgraf*, a new statute does not have retroactive effect if it does not impair rights a party possessed when he or she acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. More specifically, an intervening statute that either alters jurisdiction or affects prospective injunctive relief generally does not raise retroactivity concerns, and, thus, presumptively is to be applied in pending cases. As discussed below, the application of AEDPA § 440(d) to pending applications for section 212(c) relief does not impair a right, increase a liability, or impose new duties on criminal aliens. The consequences of Respondent's

---

[5] The single dissenting Justice in *Landgraf* was of the opinion that the presumption against retroactive legislation, "which serves to protect settled expectations," and which "is grounded in a respect for vested rights," "need not be applied to remedial legislation . . . that does not proscribe any conduct that was previously legal." *Id.* at 296-97 (Blackmun, J., dissenting) (citing *Sampeyreac v. United States*, 32 U.S. (7 Pet.) 222, 238 (1833) ("Almost every law, by providing a new remedy, affects and operates upon causes of action existing at the time the law is passed") and *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 93 (D.C. Cir.) ("Modification of remedy merely adjusts the extent, or method of enforcement, of liability in instances in which the possibility of liability previously was known."), *cert. denied*, 449 U.S. 905 (1980)).

conduct remain the same before and after the passage of AEDPA: criminal sanctions and deportation. AEDPA § [440(d)] is best understood as Congress's withdrawal of the Attorney General's authority to grant prospective relief. Thus, the statute alters both jurisdiction and the availability of future relief, and should be applied to pending applications for relief.[6]

The relief sought in a section 212(c) application, waiver of inadmissibility, is prospective in nature. A successful applicant for relief under section 212(c) will not, as a matter of the sovereign's discretion, be deported from the country, even though his or her past criminal convictions would otherwise lead to deportation. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("The deportation hearing looks prospectively to the respondent's right to remain in this country in the future. Past conduct is relevant only insofar as it may

---

[6] One formulation articulated in *Landgraf* for determining whether a statute operates retroactively—"whether [it] attaches new legal consequences to events completed before its enactment" —could be interpreted as compelling the conclusion that AEDPA § [440(d)] should not be applied to pending applications for section 212(c) relief. *Id.* at 269-70. Because the statute eliminates eligibility for a previously available form of relief from the immigration consequences of a prior criminal conviction, it could be argued that it attaches new legal consequence to a prior event. Elimination of a form of relief in this context, however, is not the same as the attachment of new legal consequences in the sense that the Court meant in *Landgraf*. If it were, most cases in the three categories that the Court identified as not constituting retroactive application when applied to past events—statutes that alter jurisdiction, procedural rules, and statutes affecting the availability of prospective injunctive relief—would also have to be understood as attaching new legal consequences to prior events and, hence, constituting retroactive application.

shed light on the respondent's right to remain."); *De Osorio v. INS*, 10 F.3d at 1042 (holding that an amendment barring applications for waivers of deportations filed after the effective date of the amendment to 212(c) is not made retroactive merely because it applies to convictions for aggravated felonies before that time: "The past aggravated felony conviction is only the prerequisite for the prospective denial of discretionary relief. . . . Congress did not attach additional consequences, but merely withdrew a previously available form of discretionary relief.").

Moreover, Congress's modification of section 212(c) operates to eliminate the discretionary authority of the Attorney General to grant relief in certain cases, and, thus, its effect is to remove jurisdiction. As the Solicitor General argued in the brief of the United States to the Supreme Court in *INS v. Elramly*, 73 F.3d 220 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1260, and *vacated*, 117 S. Ct. 31 (1996), a case raising the issue whether AEDPA divested the Attorney General of authority to grant section 212(c) relief in pending cases, "[j]ust as new 'jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties,'" *Landgraf*, 511 U.S. at 274, section 212(c) speaks to the power of the Attorney General to waive deportation, not to any right of an alien to such relief." Supplemental Brief for the Petitioner at 18. The majority opinion in *Landgraf* explains the practice of applying new jurisdictional statutes to pending cases by the fact that "a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" *Id.* at 274 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). Here, in contrast to the cases cited by the

Court, there is no alternative tribunal to which the criminal alien may petition. Even assuming that the lack of an alternative tribunal would be relevant to retroactivity analysis where a substantive right is at stake, eligibility for a congressionally created form of purely discretionary relief from the immigration consequences of a prior criminal conviction cannot properly be characterized as a substantive right.[7]

The Third Circuit's discussion of the application of an earlier amendment to section 212(c) to make an applicant ineligible for relief based on a prior criminal conviction applies equally here:

> In this case, the consequences of petitioner's criminal conduct were clear at the time of that conduct and they remain unchanged today. He was subject to possible criminal sanctions and deportation. The only relevant change in the law relates to the permissible scope of the Attorney General's discretion to grant relief from one of those consequences. Like statutes altering the standards for injunctive relief, this change has only a prospective impact. It is not designed to remedy the past but only to affect petitioner's future status with respect to the legality of his presence in the United States. Like statutes constricting the jurisdiction of a

---

[7] The concurring opinion further notes that while there may sometimes be an alternative forum, there is not always one, and even where there is, it may deny relief for some collateral reason such as a statute of limitations bar. "Our jurisdiction cases are explained, I think, by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power—so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised." *Landgraf*, 511 U.S. at 293 (Scalia, J. concurring).

> judicial body, these changes speak only to the power of a public agency. . . . Given the facts that petitioner's pre-1987 conduct clearly subjected him to deportation as well as criminal sanctions, and that § 212(c), as it then existed, offered relief from the former only at the unfettered discretion of the Attorney General, petitioner does not, and could not, contend that his conduct was undertaken in reliance on the then current version of § 212(c).

Scheidemann v. INS, 83 F.3d 1517, 1523 (3rd Cir. 1996).

The Seventh Circuit has expressed a contrary view in *Reyes-Hernandez v. INS*, 89 F.3d 490 (7th Cir. 1996), at least with respect to a narrow category of cases. In that case the petitioner had conceded deportability before the enactment of AEDPA, when he was still eligible for section 212(c) relief. The court speculated that had the petitioner known that this relief would no longer be available to him, he might have contested deportability.

> Considering the fell consequences of deportation, especially in cases of exceptional hardship, which are precisely the cases in which an appeal to section 212(c) would have a chance of success, we think it unlikely that Congress intended to mousetrap aliens into conceding deportability by holding out to them the hope of relief under section 212(c) only to dash that hope after they had conceded deportability. No such ignoble intention appears in the statute. Its absence is determinative under *Landgraf* because to make the concession of deportability a bar to relief under section 212(c) would be to attach a new legal

> consequence to the concession, an event that occurred before the new law came into existence.

Id. at 492-93. The court held that section 440(d) of AEDPA does not apply to cases in which deportability was conceded before AEDPA became law, "provided that the applicant for discretionary relief would have had at least a colorable defense to deportability; for if not, he lost nothing by conceding deportability." *Id.* at 493.[8]

Amici curiae in the current case also emphasized the reliance aliens may have placed on the availability of section 212(c) relief. Amici argue that aliens may rely on the possibility of obtaining section 212(c) relief not only when deciding whether to contest deportability, but also when deciding whether to litigate their criminal liability or enter into a plea agreement. It is true that the majority opinion in *Landgraf* notes that "familiar considerations of fair notice, reasonable reliance, and settled expectations" are factors offering "sound guidance" in "hard cases." *Landgraf*, 511 U.S. at 270. However, the Court states expressly that a statute does not operate retroactively merely because it "upsets expectations based in prior law." *Landgraf*, 511 U.S. at 270.

In any event, it is difficult to see how the possibility of obtaining section 212(c) relief would affect an alien's decision whether to concede or contest deportability. First, the criteria for determining whether someone is

---

[8] The Seventh Circuit has confirmed that *Reyes-Hernandez* applies only in cases where the petitioner conceded deportability and had a colorable defense to deportability. *Arevalo-Lopez v. INS*, No. 96-1754, 1997 WL 1898, at *2 (7th Cir., Jan. 3, 1997).

deportable as a criminal alien are specific and fixed, and the grounds for challenging deportability are quite narrow. *See Rabiu v. INS*, 41 F.3d 879, 881 (2d Cir. 1994) (record of conviction sufficient to overcome alien's challenge to deportability); *Ortega de Robles v. INS*, 58 F.3d 1355, 1358 (9th Cir. 1995) (criminal convictions may not be collaterally challenged in deportation proceeding as ground for contesting deportability). Second, an alien need not choose between contesting deportability and seeking section 212(c) relief; an alien may pursue both.

It seems more plausible that an alien may enter a plea bargain hoping to obtain relief from deportation, but even so, the alien could not have reasonably relied upon the availability of that relief. For the past forty years, the law has been settled that Congress may legislate to alter the immigration consequences of past criminal convictions or acts. Moreover, as the Supreme Court recently unanimously reaffirmed in the context of analyzing a similar provision conferring discretionary authority upon the Attorney General, "suspension of deportation [is]. . . 'an act of grace' which is accorded pursuant to her 'unfettered discretion' and is similar to 'a judge's power to suspend the execution of a sentence, or the President's to pardon a convict.'" *INS v. Yueh-Shaio Yang*, 117 S. Ct. 350, 352-53 (1996) (citations omitted). Therefore, a criminal alien could not reasonably rely on the availability of section 212(c) relief in determining whether to plead guilty to a criminal offense or in determining whether to concede deportability.

Accordingly, the application of AEDPA § 440(d) to section 212(c) applications pending before the EOIR

would not be retroactive. However, to eliminate even the remote possibility that an alien who had a colorable defense to deportability may have conceded deportability in reliance on the availability of section 212(c) relief, I direct the EOIR to reopen cases upon petition by an alien who conceded deportability before the effective date of AEDPA for the limited purpose of permitting him or her to contest deportability.

CONCLUSION

For the foregoing reasons, AEDPA § 440(d) should be applied to INA § 212(c) cases pending before the EOIR on the effective date of AEDPA. EOIR shall reopen cases upon petition by an alien who conceded deportability before April 24, 1996, the effective date of AEDPA, for the limited purpose of permitting the alien to contest deportability.

Date: February 21, 1997 /s/ JANET RENO
JANET RENO
Attorney General